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# THE ELECTORAL SYSTEM OF THE UNITED STATES

ITS HISTORY, TOGETHER WITH A STUDY OF THE PERILS THAT  
HAVE ATTENDED ITS OPERATIONS, AN ANALYSIS OF THE  
SEVERAL EFFORTS BY LEGISLATION TO AVERT THESE  
PERILS, AND A PROPOSED REMEDY BY AMEND-  
MENT OF THE CONSTITUTION

BY

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J. HAMPDEN DOUGHERTY

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THE ELECTORAL SYSTEM OF  
THE UNITED STATES

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# THE ELECTORAL SYSTEM OF THE UNITED STATES

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## INTRODUCTION

**I**T is matter of familiar knowledge that the framers of the Constitution of the United States, in devising the so-called electoral system, intended to repose absolute control over the choice of the President and Vice-President in a small body of citizens carefully selected by the several States. Their object was to avoid, on the one hand, the popular tumult and passion that might be involved in an election of the executive by the people, and, on the other, the legislative domination of the executive that might be involved in his election by the Congress. The tendency in this democratic age is to overlook the fact that the fathers of the Constitution were not believers in the rule of the people and that it was not until after 1800 that manhood suffrage was adopted in any of the States. Democracy has completely subverted the electoral theory of the framers of the Constitution, yet it still employs the same mechanism. The electoral theory contemplated the emancipation of the electors from outside control: they were to be appointed in the several States independently. The idea of a general convention was discarded because of the subtle influence which might be employed to affect the action of an assembled body, and because of the difficulty in convening so large a gathering

## The Electoral System

at the national capital. By the electoral plan the appointees of each State were to meet in that State and cast a secret ballot on the same day upon which the electors convened in all the other States, the intent being that each separate electoral college should, when making its choice, be unaware of the decision of the others. But in practical effect, the secret, independent, unpledged electors in a brief time became the absolute servants of party. Their action was early dominated by legislative and congressional caucuses, and when party conventions were developed, they became mere registers of the convention's will. Each elector thus became so completely an automaton that in ordinary circumstances he would not dream of exercising any freedom in the use of his ballot, for violation of his tacit pledge to the party that elected him would bring upon him all the odium attaching to a traitor.

This metamorphosis of the electoral system is familiar to all who possess the most superficial acquaintance with its history. But it is not so generally appreciated that the weakest part of the electoral system is the provision regarding the electoral count. In consequence of this ambiguous provision, the country has twice been brought to the brink of revolution. The Constitution prescribes that lists of the votes of electors in the several States, properly authenticated by the State executive officer, shall be transmitted in sealed packages to the president of the Senate; that they shall be opened by him in the presence of the Senate and of the House of Representatives, and that "the votes shall then be counted." This mandate, thrown into the passive form, perhaps for solemn emphasis, fails explicitly to declare *who* shall count the votes. It is, says Von Holst, "a formula that forces us to suppose that according to the views of the framers of the Constitution, the question was one simply of addition." The practice of the fathers seems to have im-

posed the duty of counting upon the president of the Senate; and it has been forcibly argued that their action was equivalent to an exposition of the meaning of the Constitution by its creators and contemporaries. By degrees the two Houses deposed the president of the Senate from this office, first by appointing tellers and passing resolutions as to the mode of counting, in which more or less of power over the count was assumed; later, by the adoption of the twenty-second joint rule, and, more recently, by the special legislation of 1877 and the general enactment of February 3, 1887. The unconstitutionality of any interference by Congress with the assumed prerogatives of the president of the Senate has been as earnestly argued in recent years as it was by Charles C. Pinckney in the Senate of 1800. But the discovery of the full significance of the ambiguity that resides in the passive expression, "the votes shall then be counted," was gradual. The convention doubtless assumed that none but legal votes would be presented by electors, all constitutionally qualified to vote, and that counting or enumerating the votes would be a simple task. Five disabilities were imposed by the Constitution upon the presidential office. One disability was imposed upon the office of presidential electors. The only limitation upon electors was that they should not be in the service of the United States, and it was to be presupposed that no State would impair or nullify its votes by appointing as its agents persons ineligible to execute the exalted trust. With like reason was it assumed that the electors appointed by a State would never select for the presidency an alien, a foreign potentate, or a person ineligible for lack of years or of residence, lest such a choice should invalidate the vote of the State; and the jealousy with which the smallest States guarded their prerogatives and insisted upon their rights was one of the cardinal difficulties that beset the convention in devising



a plan of election that would be received by them with favor. The imagination of the framers of the Constitution could not, therefore, readily conceive that the counting of the electoral vote would ever be other than a simple ministerial duty to be performed, as they probably intended, by the president of the Senate, in the presence of both Houses, as witnesses of the solemn ceremony. John Adams, as the president of the Senate, in announcing his own election to the presidency in 1797, declared that, in pursuance of the Constitution and the resolution of the two Houses, he had counted the votes; and no exception was taken to the declaration, or could well have been, under the language of the resolution adopted by the Houses just prior to the ceremony. But "counting" was found in time to involve more than "enumerating" the electoral votes, and gradually took on the significance of "canvassing." In the evolution of history, the word "State" was thought to require definition. Was Indiana a State in 1816? Was Missouri a State in 1820? Each appointed electors, and a certificate from the so-called electors of the self-styled State of Indiana lay in the pile of electoral certificates before the president of the Senate in 1817; and a similar certificate was transmitted from Missouri in 1821, although it had not actually been admitted as a State when its electors voted in December, 1820. When the question was raised, there appeared to be no constituted authority to solve it, and its solution was evaded.

The Act of Congress of 1792, following the Constitution, prescribed the time when the electors should assemble in the different States, to vote for President and Vice-President; and when the electoral certificate of Wisconsin was opened in the Senate in 1857 it disclosed the fact that the electors had attempted in good faith to obey the law and to assemble on the appointed day, but were deterred from doing so by a violent snow-storm. They

consequently met and voted the following day. When the vote was challenged in the joint session of the two Houses of Congress it was asked whether the act of God should disfranchise a State, but the actual question was, Who was to decide upon the legality of the vote? Did the Constitution import that this vast power—that of determining whether a commonwealth claiming to be a State was in fact a State, or whether a State might lawfully vote upon a different day from that designated by Congress if its vote upon the appointed day was prevented by act of God—should be confided to the president of the Senate, who might be vitally interested in the decision as a candidate for the presidency? Faulty and irregular certificates, certificates criticised for various reasons as invalid were, on later occasions, deposited on the Vice-President's desk; finally came dual, treble, and quadruple returns from a State, each importing to be sufficiently authenticated, each claiming to disclose the electoral will of the State. Was the president of the Senate to decide between these conflicting returns? If so, was he not then the arbiter of the nation's destinies? Was the power, on the other hand, in Congress; and if in Congress, was it to be exercised by the Houses sitting as one body, voting *per capita*; and if not, how was a conclusion ever to be reached if the two Houses should fail to agree?

Just before the close of the Civil War Congress adopted the twenty-second joint rule,—a measure of doubly doubtful validity. For while the power of Congress to constitute itself, by legislation, judge of disputed returns is questionable, it is equally questionable whether a joint rule, not requiring even the approval of the President, could constitutionally be employed as a substitute for legislation. From generation to generation it was predicted that trouble would ensue. Congress was urged by some to pass a general enactment, not only prescrib-

ing how State certificates should be authenticated, and State votes counted, but also creating some tribunal to decide the various questions that might, from time to time, arise. Others argued that in the legislation of 1792 and 1845, fixing the day for the choice of electors and of their assembling, and prescribing how their appointment should be certified, Congress had exhausted its power. But Congress never passed a general law until 1887. Although amendments designed to overcome the inherent difficulties of the Constitution were introduced from time to time, none was ever adopted.

In 1877, the oft-prophesied danger arose, when action upon the vote of a State was bound to decide the result. The emergency was met by an expedient of doubtful constitutionality,—the creation of an electoral commission.

The crisis of 1877 emphasized the necessity either of adequate legislation or of a constitutional amendment, if such legislation were beyond the province of Congress. The outcome of ten years' debate is the statute of February 3, 1887. This act, in so far as it recognizes each State to be the sovereign and exclusive judge over the appointment of its electors, is in undoubted harmony with the Constitution. But it raises the perennial question whether Congress has any power so to legislate as to vest in itself the decision of disputes over returns, for Congress thus becomes an ultimate President-maker. The statute is not only cumbersome in its details, but defective in failing to provide how the vote of a State shall be saved from rejection when the two Houses disagree.

The greatest aggression by Congress was the adoption of the twenty-second joint rule,—a rule which placed the electoral vote of a State at the mercy of a partisan majority in either House. This rule was repealed by the Senate on January 20, 1876, and when the difficulties of 1877 arose, the rule could not be revived, as the two Houses were of different political complexion. The

Senate would not consent to its reinstatement, for the House alone could have rejected any disputed return, and thus have made Tilden President. The substitute method, the Electoral Commission law, was adopted to avoid anarchy, and this law was criticised on the floor of the Senate by Senator Ingalls in 1886, as "a device that was favored by each party in the belief that it would cheat the other, and it resulted in defrauding both." The late Senator Dawes of Massachusetts truthfully said that it was a patriotic device, "concurred in at the time by both political parties, to avoid questions that neither could answer"; and he added: "If doubts of a like character shall ever again make the result uncertain, their solution cannot be looked for through any such method, and these questions, unanswered, may yet wreck the Government."

The Act of 1887 is an attempt to answer these questions, but it has yet to be subjected to practical test. The framers of the act conceded that it was unsatisfactory; its critics declared that it was unconstitutional, and their contention was sound.

It is beside the purpose of these pages to attempt to determine where the Constitution intended to place the counting power. A century of discussion finds the advocates of antagonistic views convinced of the correctness of their own positions. The point to be emphasized is that the history of the nation, since the formation of the Union, demonstrates not only the breakdown of the system, but the peril of its continuance. The danger is intensified, not averted, by the Act of 1887. In these circumstances, prudence dictates an amendment providing a radical cure.

The belief that has inspired the preparation of this book is that the dangers of the electoral system are not commonly understood, and that, when once they are appreciated, the electoral system will be abolished.

Although innumerable propositions for an amendment of the organic law have been offered in Congress since the earliest years of the nineteenth century, and although the disputed election of 1876 produced widespread and profound disquietude, the history of the electoral count has never formed the sole topic of any book. Much information contained in subsequent pages is to be extracted only from the records of Congress. Of the numerous proposals to amend the Constitution which these records reveal, none were ever successful after the adoption of the Twelfth Amendment in 1804. Many of the proposals were printed by the House in which they were presented, but never received further consideration. Some were referred to committees and were made the subject of report, but were never discussed upon the floor of Congress. A few provoked animated debate. There developed in the winter of 1823-4 and of 1825-6, an intense desire for amendment, and many of the ablest leaders of the Senate and House spoke upon the numerous suggestions then made. Between 1873 and the winter of 1876-7, Morton was the protagonist of the electoral reform, and the discussions took a broader range than formerly, inasmuch as intervening history had shed new light upon the problems of the electoral count. Two figures in these two separate epochs stand out pre-eminently as advocates of reform,—Benton and Morton.

There is not much to encourage the hope of successful reform in the story of the failures of the past. While the State constitutions, as Mr. Henry Hitchcock has so admirably shown, exhibit great flexibility and have repeatedly been altered by amendment, the Federal Constitution has for a century resisted peaceful alteration, and with the increase in the number of States its rigidity becomes greater.

The necessity for constitutional changes in the electoral system is far more evident to-day than it was in Benton's

time, and the reform has a powerful ally, the need of which he realized,—public opinion. If the people can be taught the transcendently urgent importance of abolishing a system that was an exotic when it was first adopted; that has never performed its contemplated function; that has been criticised ever since its creation, has become useless, and, what is much worse, dangerous, their wisdom may be trusted to discover the remedy.

The aim in this discussion of the electoral system has been to admit nothing irrelevant, and to omit nothing essential; for no amendment that has been proposed can be properly criticised, nor can anything synthetic be attempted, until the history is understood. I have, after the briefest analysis of the present constitutional provisions, traced the story of the electoral count from 1789 up to the scenes in Congress in 1857. I have proceeded to state the various interpretations which had been given to the inscrutable words "the votes shall then be counted," and briefly explained the Federalist bill of 1800, which, although it never became law, was the germinal idea from which all subsequent rules and enactments have sprung. I have given the unbroken record of the count up to 1857, before discussing the bill of 1800, because that seemed a necessary prelude to a full comprehension of the bill itself. The history of the Electoral Commission law of 1877 and an analysis of the proceedings before the electoral tribunal seemed necessary not only to explain the circumstances which led to the enactment of the general law of February 3, 1887, but to show the radical need of a constitutional remedy and the nature of that remedy. If, as some of our greatest jurists have said, the weakest spot in the Constitution is the electoral system, no subject more important can engage the attention of thoughtful and patriotic Americans.

The debates, except during the excitement of an actual count, exhibit, as a rule, a lack of partisanship in the

divergence of opinion. These debates cover thousands of pages, yet there is much in them worthy of study. Morton's speech to the Senate, in moving a reference of the subject of the electoral count to the Committee on Privileges and Elections, in February, 1873, is a luminous statement of the case up to that date and clearly shows the need of an amendment to the Constitution; and, to the hour of his death, Morton was convinced that nothing short of an amendment would be adequate. Profound interest attaches to Senator Conkling's speech upon the Electoral Commission bill of 1877, as Conkling, contrary to the expectation of the extreme members of his party, argued that the power to count was not with the president of the Senate, but had been reposed by the Constitution in the two Houses assembled at the opening of the electoral certificates.

The "general-ticket" plan of choosing electors, which has come to be universal in its operation, has been little discussed by writers upon the Constitution. Kent, who was retired from the judiciary of New York at sixty,<sup>1</sup> but who added a nobler lustre to his fame by his *Commentaries*, written between 1826 and 1830, naturally failed to deal with a system which was then in its comparative infancy. Story, writing upon the Constitution in 1833, after an allusion to the gradual abandonment of the district system, then retained by only two States, and the disadvantage it might occasion them while other States gave an unbroken electoral vote, merely says that a constitutional amendment providing for "a uniform choice by the people" has been thought desirable by many statesmen. Bryce, in his *American Commonwealth*, devotes less than a page to the topic. Edward Everett strongly commended the general-ticket plan in the House of Representatives in 1826, in replying to those who favored the establishment of a uniform district system

<sup>1</sup> The age limit under the first and the second constitution of the State.

by an amendment to the Constitution. The general-ticket plan is not of the warp and woof of the Constitution, although one of the Presidents, Benjamin Harrison, wished it incorporated into the fundamental law of the land. An attempt is here made to depict the evils of that system.

The district system is also considered, with the conclusion that, although a possible improvement upon the general-ticket method, it contains grave and apparently irremediable imperfections. There is no plan so admirable as the proportional plan,<sup>1</sup> which has the great advantage over all others, as is shown in Chapter XIII., of wonderfully simplifying the whole subject of the electoral count, in effect making a contest highly improbable, if not practically impossible. No author has undertaken to discuss the various amendments to the electoral system that have from time to time found earnest and able advocates in Congress. One cardinal weakness present in all these propositions is their defective provision for the electoral count.

Every one, it may be said, grants that the electoral system has outlived its usefulness. Many practical considerations, such as the inability of voters to deal with a complicated electoral ballot, demonstrate the inefficiency of the system. It should be, others say, a comparatively simple task to frame an amendment dispensing with electors and still retaining the relative influence the Constitution assigns to the States. A rational amendment has to be predicated upon adequate historical knowledge. The conviction that without a more thorough appreciation

<sup>1</sup> "Proportional representation means simply representation in proportion to the number of votes cast as distinguished from the present majority rule, where it is all or nothing. It is secured in this way: Divide the whole number of votes cast in any political unit, whether it be a State, county, city, or town, by the number of representatives to be chosen, and the quotient will be the quota or number of votes necessary to elect one representative."—(63 *Atl. Mo.*, p. 428, March, 1889.)



than is commonly manifest of the practical peril imminent in the electoral system, no person can reasonably offer or accept a remedy, has directed the preparation of this book.

An amendment is needed on account of defects other than those of the electoral system. The Constitution fails to provide who shall succeed to the presidency if the President-elect should die before his inauguration. Congress would be justified, if necessary, in the adoption of extra-constitutional means for keeping the executive department alive, for the right of the Government to maintain itself, or, as Seward wrote to Charles Francis Adams in 1862, "to live," is fundamental and deeper than any written law. If, for example, during the War of 1812, the British had captured the city of Washington and had imprisoned or deported not only the President and the Vice-President of the United States, but all officers of the Government who, under the law of 1792, would have succeeded them in executive authority, it would have been the duty of Congress to continue the executive department, and to prevent its cessation for a single moment. But resort to such expedients in a time of peace and intense party excitement might be productive of civil war or revolution, and hence the paramount necessity of some adequate provision in the Constitution itself to cover every possible case of failure of executive authority.

## CHAPTER I

### THE PROVISIONS OF THE CONSTITUTION RESPECTING THE ELECTORAL SYSTEM—COUNTING IN 1789—THE ACT OF 1792

**N**O subject debated in the convention which framed the Federal Constitution gave rise to more animated or protracted discussion than the manner of choosing the President. The delegates considered the advisability of an election by vote of the people and also by both Houses of Congress. The plan finally adopted was that the electors appointed by a State should meet in the State on the same day on which the electors assembled in all the other States, and that each separate electoral college, untrammelled and uninfluenced, should select some person fit in the judgment of its members to be chief magistrate of the country.

The idea of election by the people had able advocates. One of these was Gouverneur Morris, of Pennsylvania, who successfully opposed a choice by the Federal legislature. Others included Dr. Franklin, and John Dickinson, of Delaware, James Wilson, of Pennsylvania, and Daniel Carroll, of Maryland. Profound distrust of the people was expressed by other delegates. Roger Sherman, of Connecticut, thought that "the people would never be sufficiently informed of the character of men to vote intelligently for the candidates that might be presented." Charles C. Pinckney, of South Carolina, said, "The people would be incited by designing and active

demagogues." Elbridge Gerry, of Massachusetts, considered a popular election "radically vicious," and George Mason, of Virginia, went so far as to say, "It would be as unnatural to refer the choice of a proper person for President to the people, as to refer a trial of colors to a blind man." Unwilling to confide the election to the people, but equally resolute in the determination that Congress should have no part or lot in the selection of the chief executive, the convention finally approved the electoral plan. Upon no subject was there more vacillation or uncertainty. "No less than ten methods of choosing a President were seriously proposed and debated," said Ingalls, of Kansas, in the Senate, on February 1, 1886. Bancroft thus reviews the proceedings:

"And now the whole line of march to the mode of the election of the President can be surveyed. The convention at first reluctantly conferred that office on the national legislature; and to prevent the possibility of failure by a negative of one House on the other, to the legislature voting in joint ballot. To escape from danger of cabal and corruption, it next transferred full and final power of choice to an electoral college that should be the exact counterpart of the joint convention of the two Houses in the representation of the States as units, as well as the population of the States, and should meet at the seat of government. Then, fearing that so large a number of men would not travel to the seat of government for that single purpose, or might be hindered on the way, they most reluctantly went back to the choice of the President by the two Houses in joint convention. At this moment, the thought arose that the electors might cast their votes in their own several States, and transmit the certificates of their ballots to the seat of government. Accordingly, the work of electing a President was divided; the convention removed the act of voting from the joint session of the two Houses to electoral colleges in the several States, the act of voting to be followed by the transmission of authenticated certificates of the votes to a branch of the

general legislature at the seat of government; and then it restored to the two Houses in presence of each other the same office of counting the collected certificates which they would have performed had the choice remained with the two Houses of the legislature."<sup>1</sup>

Hamilton, advocating in the *Federalist* the ratification of the Constitution by the people of the State of New York, after stating that no part of the system framed by the convention was attended with greater difficulty than the method of choice of a President, thus praises this part of the convention's work:

"The precautions which have been so happily concerted in the system under consideration promise an effectual security against this mischief (the danger of tumult and disorder); the choice of *several* to form an intermediate body of electors will be much less apt to convulse the community with any extraordinary and violent movements than the choice of one who was himself to be the final object of the public wishes. And as the electors chosen in each State are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments that might be communicated from them to the people than if they were all to be convened at one time, in one place."

Chancellor Kent, in treating of the election of President, observes:

"The mode of his appointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the Constitution; and if ever the tranquillity of this nation is to be disturbed, and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the Constitution; and if we shall be able, for half

<sup>1</sup> *Hist. of U. S.* (Bancroft), vi., pp. 339, 340.

a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind.

“The Constitution, from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of a President, directly and immediately to the people; but it has confided the power to a small body of electors, appointed in each State, under the direction of the Legislature; and to close the opportunity as much as possible against negotiation, intrigue, and corruption, it has declared that Congress may determine the time of choosing the electors, and the day on which they shall vote, and that the day of election shall be the same in every State. This security has been still further extended by the act of Congress directing the electors to be appointed in each State within thirty-four days of the election.”

✓ The report of the Senate Committee on Privileges and Elections, in 1874, states:

“The theory of the electoral college was that a body of men should be chosen for the express purpose of electing a President and Vice-President, who would be distinguished by their eminent ability and wisdom, who would be independent of popular passion, who would not be influenced by tumult, cabal, or intrigue, and that in the choice of the President they would be left perfectly free to exercise their judgment in the selection of the proper person. And in order to secure more perfectly the independence of the electors the Constitution provides that they shall vote by ballot in the electoral college, so that it might not be known to each other or to the country how they voted. In short, the idea was that a small body of select men could be more safely intrusted with the election of the President and Vice-President than the whole body of the people.”

Says Mr. Justice Story, in his *Commentaries on the Constitution*:

"The appointment of the President is not made to depend upon any pre-existing body of men, who might be tampered with beforehand to prostitute their votes; but is delegated to persons chosen by the immediate act of the people, for that sole and temporary purpose. All those persons, who, from their situation, might be suspected of too great a devotion to the President in office, such as Senators and Representatives, and other persons holding offices of trust or profit under the United States, are excluded from eligibility to the trust. Thus, without corrupting the body of the people, the immediate agents in the election may fairly be presumed to enter upon their duty free from any sinister bias. Their transitory existence and dispersed situation would present formidable obstacles to any corrupt combinations; and time, as well as means, would be wanting to accomplish, by bribery or intrigue of any considerable number, a betrayal of their duty."

Mr. Bryce, in his *American Commonwealth*, writes:

"To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement, and would have given too much encouragement to candidates of merely popular gifts. To have entrusted it to Congress would have not only subjected the Executive to the legislature in violation of the principle which requires these departments to be kept distinct, but have tended to make him a creature of one particular faction instead of the choice of the nation."

The growth of democracy quickly revolutionized the plans of the framers of the Constitution. The independence which electors were to exercise in choosing a candidate for the presidency soon gave way to a positive obligation upon their part to obey the dictates of party.

No presidential elector would to-day cast his vote for any presidential candidate other than the one selected by the party whose representative he himself is. In 1796 three Democratic electors, passing over the preference of their party, voted for John Adams for the presidency. Elbridge Gerry, one of the electors selected by the Democracy of Massachusetts, voted for Adams in place of Jefferson, but subsequently explained his action by letter to Jefferson, evidently to the latter's satisfaction. Had two of the three Democratic electors who voted against their party's candidate voted for him, Jefferson would have succeeded to the presidency in 1797, instead of 1801. No one at the time questioned the propriety of the action of these electors; whereas, to-day, the exercise of such freedom would be deemed a breach of trust. Since 1796 there has been no well-authenticated case of an elector's failure to carry out his party's expectations.<sup>1</sup>

The Constitution of the United States commits the method of the appointment of electors absolutely to each State. Several modes of choosing electors were, in the early elections, simultaneously in use in different States, namely, choice by the Legislature, either by joint ballot or concurrent vote; election by the people by general ticket, the whole number of electors being voted for on one ballot throughout the State; or choice by districts.

<sup>1</sup> "From the beginning," says Benton, "the electors have stood pledged to vote for the candidates indicated [in the early elections] by the public will; afterwards, by Congress caucuses, so long as these caucuses followed the public will; and since, by assemblages called conventions, whether they follow the public will or not. In every case the elector has been an instrument, bound to obey a particular impulsion; and disobedience to which would be attended with infamy, and with every penalty which public indignation could inflict. From the beginning these electors have been useless, and an inconvenient intervention between the people and the object of their choice, and in time may become dangerous. The institution should be abolished, and the election committed to the direct vote of the people!"

This last method is considered by Hildreth, in his *History of the United States*, as

“evidently that which gave the fairest expression of public opinion by approaching nearest to a direct vote. But those States which adopted it were placed at the disadvantage of being exposed to a division of their strength and neutralization of their vote; while the electors chosen by either of the other methods voted in a body on one side or the other, making the voice of the State decisively felt.”

This consideration, he says, induced the two leading States of Massachusetts and Virginia to abandon the district system. In Virginia the Democratic-Republican (the modern Democratic) party was overwhelmingly predominant; hence the legislature of that State gave to the people the right of choice by general ticket. In Massachusetts, the parties being more evenly divided, the Legislature retained the right of appointment. The general-ticket system, however, gradually came into favor and was finally adopted by all the States.

In a speech in the Senate in December, 1823, in which he advocated a constitutional amendment providing for an election by the people in districts, Benton said:

“The general-ticket system now existing in ten States was the offspring of policy and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States to enable them to consolidate the vote of the State. It would be easy to prove this by referring to facts of historical notoriety. It contributes to give power and consequence to the leaders who manage the elections, but it is a departure from the intention of the Constitution, violates the right of minorities, and is attended with many other evils.”

His argument as to the infringement of the rights of minorities is unanswerable:

“In New York thirty-six electors are chosen, nineteen is a



majority, and the candidate receiving the majority is fairly entitled to count nineteen votes; but he counts in reality thirty-six, because the minority of seventeen is added to the majority. These seventeen votes belong to seventeen masses of people, of 40,000 souls each, in all 680,000 people, whose votes are seized upon and taken away, and presented to whom the majority please. Extend the calculation to the seventeen States now choosing electors by general ticket or legislative ballot, and it will show that three millions of souls, a population equal to that which carried us through the Revolution, may have their votes taken from them in the same way."

The provisions of Article II. of the Constitution of the United States relative to the election of the President and Vice-President are brief and apparently not ambiguous. Nevertheless, discussion of one short phrase continued for the better part of one hundred years, and opinion as to its meaning is not unanimous to-day.

Subdivision 2 of Section 1 of Article II. is as follows:

"Each State shall appoint in such manner as the Legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector."

This terse clause, the outcome of long debate in the convention, is so worded as to vest the manner of appointment of the electors to which each State is entitled, in the Legislature of the State. There is no obligation on the part of a State to appoint electors. It may, if it so wills, decline to participate in a presidential election, and such failure actually happened in New York in 1789. The State Assembly, full of the partisans of Clinton, and strongly Anti-Federal, wished to vote for electors in joint convention with the Senate, which would have

given the Anti-Federalists two United States Senators and ten electors. But the Upper House insisted upon a concurrent vote, which would have given it one Senator and five electors. As neither House would recede from its position, the State lost its electoral vote. Neither North Carolina nor Rhode Island had ratified the Federal Constitution when the first election occurred, and as a consequence neither of those States took part in it.

The Legislature of each State is clothed with absolute power to determine in what manner the electors shall be appointed. The word "appointed" is highly significant. It was designedly employed. It is not a democratic term; there is no implication of a popular election in it. The convention could not have employed a stronger expression to import the plenary authority of the State.<sup>1</sup> So absolute is the power conferred upon each State legislature that it may, as was said by the eloquent Henry R. Storrs, of New York, in the House of Representatives in the spring of 1826, vest the appointment of electors in "a board of bank directors, a turnpike corporation, or a synagogue." The number of electors to which each State is entitled is equal to the whole number of Senators and Representatives to which the State is entitled in Congress. This clause is one of the compromises of the Constitution between the large and the small States. It recognizes the rights of a State as a separate entity, but also the right of majority rule. The electoral colleges, says Bancroft, were to be the "exact counterpart of the joint convention of the two Houses in the representation of the States as units, as well as the population of the States." A State, no matter how small in population, is entitled to two Senators and at least one Representative. This inequality of representation gave rise to the sentiment that "the small States were the favorites of the

<sup>1</sup> It "was manifestly used as conveying the broadest power of determination."—*McPherson vs. Blacker*, 146 U. S., 1.

Constitution," but this apparent advantage is nullified under the general-ticket system, which makes the election turn upon the vote in the large States.

While Subdivision 3 of Section 1 of Article II. was amended in 1804, the original provisions must be considered in order that the subject may be fully understood.

Under Subdivision 3 the provision is that the electors meeting in their respective States shall vote by ballot for two persons, one at least of whom shall not be an inhabitant of the same State with themselves. This provision was a concession to the smaller States, who were fearful that the President would be chosen exclusively from the larger States. The same jealous feeling led to their demand that whenever there should be a failure to reach a choice through the electoral college, not less than five of the highest candidates should be voted for in the House of Representatives.

Subdivision 3 further provides that the electors shall make a list of all the persons voted for and of the number of votes for each, which list they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. "The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." As the Constitution originally stood, it prescribed:

"The person having the greatest number of votes shall be the President if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose

shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

A plurality of the electoral vote was not deemed sufficient for the election of a President. He must have a majority of the number of electors, and, as the electors of each State were free to choose two persons, obviously more than one person might have a majority of votes. Hence, where two persons had the same number of votes, and a majority of votes, the election was transferred to the House of Representatives, in which representation is the counterpart of that in the electoral system, for the House of Representatives is composed of members from each State, apportioned among the several States according to their respective numbers. The choice in the House was to be made between the two persons having a majority and the same number of electoral votes. If, as might happen, no person had a majority of all the electoral votes, the House was to choose from the five highest on the list, but as a concession to the small States the vote was to be taken by States, the entire representation from each State having but one vote, a majority of the States being necessary to a choice.<sup>1</sup>

<sup>1</sup> Hon. O. P. Morton, in a speech in the Senate in 1873, said: "The objections to this constitutional provision for the election of a President need only to be stated, not argued. First, its manifest injustice. In such an election each State is to have but one vote. Nevada, with its forty-two thousand population, has an equal vote with New York, having one hundred and four times as great a population. It is a mockery to call such an election just, fair, or republican." He also showed that under the apportionment existing in 1873, forty-five members of the House, drawn from nineteen States which he named, could, each State having one vote, control an election in a House then consisting of two hundred and ninety-two

Only a few years were needed to develop some of the worst imperfections of the original electoral plan.

"The theory," says Judge Cooley,<sup>1</sup> "failed miserably and utterly twelve years after the plan was first carried into effect. It was shown in the presidential election of 1800 that under its workings a person whom no man's purpose or judgment had selected for the first position might receive and was likely to receive as many votes as the person whom the same electors had intended to prefer by their suffrages, and that when the election was transferred to the House of Representatives the former, though never intended for any other than the subordinate position, might possibly be chosen over the real choice of a majority of the electors. On that occasion, Mr. Burr, though probably not the choice of a single elector, might have been and probably would have been chosen but for the patriotism of Mr. Hamilton and a few others among the Federalists who protested against it. But Mr. Jefferson's election was not accomplished until after the subject of filling the position in some extra-constitutional mode had been mooted, the at-

members, representing thirty-seven States. "Nineteen States, or a majority of the States in the Union, and forty-five members, may cast their votes, and elect a President of the United States, against the wishes of the other two hundred and forty-seven members of the House of Representatives. Again, these nineteen States have an aggregate population by the census of 1870 of a fraction over eight millions of people, while the remaining eighteen States have an aggregate population of about thirty millions. So that nineteen States, having scarcely more than one fifth of the entire population of the United States, may elect a President in the House of Representatives against the wishes of the other four fifths. And this by courtesy has been called Republican government! Compared with it the rotten-borough system was a mild and very small bagatelle."

Justice Story was greatly impressed with the danger to the stability of the Government involved in the necessity of a choice in the House, which had occurred twice when he wrote his *Commentaries*, but has never since taken place, although he thought there was every probability of its frequent occurrence. The first such election resulted in the Twelfth Amendment; the second, which gave the people in J. Q. Adams a minority candidate, led to a demand for a constitutional amendment in which the election should be had by the people voting in districts.

<sup>1</sup> "Method of Electing the President," 5 *Int. Rev.* 198.

tempt to do which would probably have been resisted with force."

The difficulty had been predicted years before it arose. As early as January 6, 1797, an amendment was offered, although ineffectually, in the House of Representatives, the object of which was to require the electors to distinguish in their ballots between candidates for the presidency and the vice-presidency. William L. Smith of South Carolina, who offered the amendment, declared that great inconveniences might arise under the then existing mode, that "it could not answer the end intended" by its framers,—“to carry into effect the real intention of the electors.” A similar amendment was offered in the same House on February 16, 1799, but the motion to refer it to a committee was negatived by a vote of fifty-six to twenty-eight. Just about a year before the Jefferson-Burr contest, on February 4, 1800, the same idea reappeared in an amendment presented in the House, which further proposed that the Senate, in the failure of a choice of a Vice-President by the electors, should make the selection from the five highest on the list. On January 24, 1798, Humphrey Marshall, of Kentucky included this idea in an amendment which he introduced in the Senate. The simple change eventually made by the Twelfth Amendment was not possible until, in 1801, the country was taught its necessity by actual peril. The conservative spirit of the time is well illustrated by the statement in the House, of Huger of South Carolina, in opposition to the proposed Twelfth Amendment, that he confessed he trembled at the idea of altering the Constitution, although he was attached to that part of it which gave the right of altering it. A like feeling prompted Storrs of New York to exclaim in the House in 1826, “The convention which framed the Constitution seemed to have been inspired in their labors.”

This unreasoning reverence, by taking away all virility from the power of amendment, would check constitutional development. Another defect in the article under consideration lay in the fact that while the clause carefully safeguarded the elected chief executive from foreign influence and fixed the minimum age-limit of eligibility, it left the door wide open for the intrusion of a foreigner or of a person under age into the presidential office in case the Vice-President became acting President. The Twelfth Amendment remedied this by prescribing that no person ineligible to the presidency should ever become Vice-President. It was finally approved in the House of Representatives on December 12, 1803. The vote was 83 yeas to 42 nays, and the Speaker's yeas was requisite to its passage. It was ratified by thirteen of the seventeen States and declared in force September 25, 1804.

The convention which framed the Federal Constitution provided in Article VII. thereof that its ratification by conventions in nine States should be sufficient for the establishment of the Constitution between the States so ratifying the same. It also drafted a resolution which was presented with the Constitution to the various States for ratification. The full text of this important resolution is as follows:

*"Resolved*, That it is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution; that after such publication the electors should be appointed, and the Senators and Representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to

the Secretary of the United States in Congress assembled; that the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a president of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute the Constitution."

The language of the Constitution in Subdivision 3 of Section 1 of Article II. (and the same phraseology reappears in the Twelfth Amendment) is, "the president of the Senate shall in the presence of the Senate and House of Representatives open all the certificates, and the votes shall then be counted." The clause evidently imports that both Houses shall assemble in one place, that the president of the Senate shall act as the presiding officer of the joint meeting, and that he shall open all the certificates.<sup>1</sup> No words of the Constitution have given rise to more discussion or more seriously threatened the permanency of the Government. Yet as Senator Edmunds declared in the debates of January, 1877, the early Congress found no difficulty in this clause, for it left it unchanged in the Twelfth Amendment.

<sup>1</sup> Bancroft says: "The Vice-President was *never* charged with the power to count the votes. The person who counted the first votes for President and Vice-President was no Vice-President, but a Senator elected by the Senate as its presiding officer, for that act, under a special authority conferred by the Constitution for that one occasion when the Constitution was to be set in motion." The "special authority conferred by the Constitution" is an allusion to the resolution framed by the convention of 1787, and submitted with the Constitution for popular ratification.

"The Constitution does not expressly declare *by* whom the votes are to be counted and the result declared. In the case of questionable votes, and a closely contested election, this power may be all-important; and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two Houses are present merely as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."—Kent's *Commentaries*, i., p. 277.



The article under consideration further provides that Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States. These are the only constitutional provisions touching the election of the President and the Vice-President.

The Constitution provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." Such ratification having been secured, a resolution was passed by the Congress of the Confederation, declaring: That the first Wednesday in January, 1789, should be the day for appointing electors in the several States which, before that date, should have ratified the Constitution; that the first Wednesday in February, 1789, should be the day for the electors to assemble in their respective States, and vote for a President, and that the first Wednesday in March of the same year should be the time and the seat of Congress (at that time, New York,) the place for commencing proceedings under the Constitution. When the first Senate under the Constitution convened in April, 1789, after appointing a president, it directed the House of Representatives to be advised

"that a quorum of the Senate had been formed, and a president had been elected, for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States, and the Senate is now ready in the Senate chamber to proceed, in the presence of the House, to discharge that duty; and that the Senate have appointed one of their members to sit at the clerk's table to make a list of the votes as they shall be declared; submitting it to the wisdom of the House to appoint one or more of their members for the like purpose."

The House, upon the receipt of this message, resolved :

“ That Mr. Speaker, attended by the House, do now withdraw to the Senate chamber, for the purpose expressed in the message from the Senate; and that Mr. Parker and Mr. Heister be appointed, on the part of this House, to sit at the clerk's table with the members of the Senate, and make a list of the votes as the same shall be declared.”

Thereupon the Speaker, attended by the House, withdrew to the Senate chamber, for the purpose expressed in the message from the Senate. John Langdon of New Hampshire, the president of the Senate, opened and counted the votes and declared the result to the two Houses. No question seems to have arisen regarding any of the certificates, and the counting was nothing more than a mere computation. The reasonable deduction from the language of the resolution, which was accepted by a Congress some of whose members had been delegates to the convention of 1787, is, that the duty of opening the certificates and counting the votes fell to the president of the Senate.

On March 1, 1792, Congress passed an act fixing the time and place in which the electors should meet in the several States, and designating the officer who should be President in case of vacancies in the offices of both President and Vice-President. The act provided that electors should be appointed in each State within thirty-four days preceding the first Wednesday in December, 1792, and within thirty-four days preceding the first Wednesday in December in every fourth year thereafter; that the electors should meet and give their votes on said first Wednesday in December at such place in each State as should be directed by the Legislature thereof; that the electors in each State should make and sign three certificates of all the votes by them given, and seal up the same, certifying on each that a list of the votes of such State

for President and Vice-President was contained therein, and, by writing under their hands or under the hands of a majority of them, appoint a person to take charge of and deliver to the president of the Senate at the seat of government, before the first Wednesday in January then next ensuing, one of the said certificates, forward by post to the president of the Senate at the seat of government one other of the certificates, and cause the third to be delivered to the Federal judge of the district in which they assemble. The act further made it the duty of the executive authority of each State to have three lists of the names of the electors of such State made, certified, and delivered to the electors on or before the said first Wednesday in December, and the electors were directed to annex one of said lists to each list of their votes. In case no list of votes should be received from a State at the seat of government on the first Wednesday of January, the Secretary of State was instructed to send a special messenger to the district judge for the list transmitted to him by the electors. Congress was then required to be in session on the second Wednesday in February succeeding every meeting of the electors, and the certificates were then to be opened, the votes counted, and the persons to fill the offices of President and Vice-President ascertained and declared according to the Constitution. If there should be no president of the Senate at the seat of government on the arrival of the persons entrusted with the lists of the votes of the electors, the votes were then to be delivered into the temporary custody of the Secretary of State, who was charged with the duty of promptly delivering them to the president of the Senate upon that official's arrival. The statute also contained provisions declaring what officer should be President, in case of vacancies in the office both of President and Vice-President.

Except for a supplementary act enforcing the provisions

of the Twelfth Amendment, this legislation continued in force, unaltered, until January 23, 1845, when Congress prescribed that the electors should be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they were to be appointed. Each State was also authorized to provide by law for the filling of any vacancies in its college of electors, when such college met to give its electoral vote; and in case of failure to make a choice of electors at an election duly held it was provided that electors might be appointed on a subsequent day in such manner as the State might by law prescribe. There is express authority in the Constitution for the first branch of this legislation, for that instrument declares that the Congress may determine the time of choosing the electors and the day on which they shall give their votes. But as each State has absolute control over the appointment of its electors, the latter branch of the Act of 1845 seems to be unnecessary, if not inimical to the Constitution.

## CHAPTER II

### COUNTING—1793 UNTIL 1857

**A**T the election of 1793, the two Houses of Congress adopted a mode of procedure for the counting of electoral votes, which, with changes subsequently to be noted, has been pursued ever since. Each House appointed a committee<sup>1</sup> to join a committee of the other, "to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected, of their election, and for regulating the time, place, and manner of administering the oath of office to the President." The report to the Senate from the joint committee upon the mode of procedure, reads,

"that the two Houses shall assemble in the Senate chamber; . . . that one person be appointed a teller on the part of the Senate, to make a list of the votes as they shall be declared; that the result shall be delivered to the president of the Senate, who shall announce the state of the vote and the persons elected to the two Houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President, and together with a list of the votes be entered on the journals of the two Houses."

This was agreed to. A like report from the joint committee to the House of Representatives was agreed to

<sup>1</sup> The proposition for a joint committee originated in the House of Representatives.

by that body, with this difference, that the House appoint two tellers. These resolutions would appear to conflict with the theory that the president of the Senate had plenary control of the count. No question arose over the electoral vote of 1793. Both Houses assembled in the Senate chamber, tellers were appointed in conformity with the resolution to make a list of the votes, and the president of the Senate announced the result. The journal of the Senate contains the following entry:

“ The two Houses having accordingly assembled, the certificates of the electors of the fifteen States in the Union, which came by express, were by the Vice-President opened, read, and delivered to the tellers appointed for the purpose, who, having examined and ascertained the votes, presented a list of them to the Vice-President, which list was read to the two Houses, and is as follows:

[Here follows table of votes.]

“ Whereupon

“ The Vice-President declared George Washington unanimously elected President of the United States, for the period of four years, to commence with the fourth of March next; and

“ John Adams elected by a plurality of votes Vice-President of the United States for the same period, to commence with the fourth day of March.”

In the counting of the vote in 1797 the course of procedure adopted in 1793 was substantially followed, except that the Senate anticipated the House in moving a joint committee. In the election of 1797, the count showed 71 votes for Adams, 68 for Jefferson, and 59 for Thomas Pinckney. This state of the vote became known during the winter of 1796, and as party feeling was strong, some were disposed to question the validity of the vote for Adams in Vermont because the Legislature of that State had appointed electors without first enacting a law

prescribing the manner of their appointment.<sup>1</sup> The Vermont certificate was accepted in the joint session apparently without question, Mr. Adams as president of the Senate declaring the result and his own election. The result evinced the close balance of parties and portended the change in administration that was soon to occur.

In the spring election in New York City in 1800 the Federalists, whose prestige had fallen all over the Union, were defeated. General Hamilton became so alarmed at the probable loss of the Legislature and of the State electors by his party that he urged Governor Jay immediately to convene the existing Legislature for the purpose of securing a law providing for the election of electors by the people in districts, notwithstanding the fact that such a suggestion had been defeated at the preceding session by the vote of the Federalists in the Legislature. "I am aware," wrote Hamilton, "that there are weighty objections to the measure, but the reasons for it appear to me to outweigh the objections; and in times like these in which we live, it will not do to be over-scrupulous." So long as nothing was proposed which integrity would forbid, "the scruples of delicacy and propriety," he asserted, "ought not to hinder the taking of a legal and constitutional step to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of state." The choosing of electors by the people in districts would ensure a majority of votes in the United States for a Federal candidate. Jay refused to adopt Hamilton's suggestion, and the new Legislature in joint ballot chose Democratic electors. In December it was learned that the electoral votes throughout the country stood 73 for Jefferson; 73, Burr; 65, Adams;

<sup>1</sup> Jefferson had previously declared that "in so great a case, substance and not form should prevail. I cannot suppose that the Vermont constitution has been strict in requiring particular forms of expressing the legislative will."

64, Pinckney; and that the tie between Jefferson and Burr would throw the election into the House of Representatives.<sup>1</sup>

On February 11, 1801, both Houses convened in the Senate chamber. One teller was appointed for the Senate and two for the House. The tellers broke the seals of the electoral certificates and opened the envelopes, handing the certificates to Mr. Jefferson, the president of the Senate, who in turn announced the vote, the tellers writing the results and in clerical capacity making the actual computation.

According to Matthew L. Davis, Burr's intimate friend and chosen biographer, the tellers, believing there was some informality in the vote of Georgia, handed Jefferson a package containing the electoral certificate from that State, which was not authenticated by the signature of the electors, but merely declared, without signature, that the votes of the State were four for Jefferson and four for Burr. To the surprise of the tellers, Jefferson promptly announced that the votes stood four for Jefferson, and four for Burr. Mr. Wells, one of the tellers, is said afterwards to have stated that the vote of Georgia was informal, and that if the ballots from that State had not been accepted by the presiding officer, the result would have brought all the candidates for the presidency before the House, Pinckney among the number, and that Jefferson could not have been elected President. Jefferson probably knew the votes were

<sup>1</sup> "One vote for Jefferson in Pennsylvania deserves notice, since it is believed to have been given by the only elector in the history of the country who has ever betrayed the trust reposed in him by those who supported him. . . . The treachery of this elector was the subject of an exceedingly plain-spoken communication in the *United States Gazette* from an exasperated Federalist. 'What!' he exclaimed, 'do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think.'"—Stanwood, *A History of the Presidency*, pp. 50, 51.



regular, but uncertified through simple inadvertence, and read them as a matter of course, without reflection upon the remote consequence that might ensue if they were not counted.

The whole number of electors voting was 138, of which number Thomas Jefferson and Aaron Burr had a majority; but as the vote for each was equal there was no choice, and consequently the duty of electing a President devolved upon the House of Representatives. The two Houses then separated and the representatives returned to their own chamber. The roll was called, the gallery cleared, and the voting begun. The balloting continued in the House from February 11 to February 17, 1801, without adjournment, and upon the thirty-sixth ballot the Speaker declared that the votes of ten States had been given to Jefferson, the votes of four States had been given to Aaron Burr, and the votes of two States (New Jersey and Delaware) had been given to —. The ten States which finally voted for Jefferson were New York, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, Vermont, and Maryland.

Hamilton thus extolled the method adopted by the convention of 1787:

“The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit that the election of the president is pretty well guarded. I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages the union of which was to be wished for.”

The cardinal merit of the system, according to other advocates, was that it would prevent intrigue and cabal, yet

the strange fact is that the system adopted by the convention encouraged the evils it was expected to avoid. Burr, whether justly or unjustly, was charged with negotiating with Federalist electors to obtain their support. During the vote in the House of Representatives, the delegations from Vermont and Maryland were divided until the thirty-sixth ballot. The Federalist electors were violently opposed to the election of Jefferson, but at the last, because of an alleged promise that certain Federalist officials should not be removed if Jefferson were elected, the opposition of Vermont was withdrawn, blank ballots were voted by the Federalists from Maryland, and thus the contest was terminated.

The election of 1801 demonstrated the unwisdom of voting for both President and Vice-President upon the same ballot. It showed the danger of a tie vote. It revealed the innumerable temptations to candidates and electors to enter into bargains and coalitions. It proved the possibility of electing a President from one party and a Vice-President from another. To obviate these evils, the Twelfth Amendment was adopted. This amendment provides that if no person have a majority of all the electoral votes, the choice of President shall be made by the House from the persons having the highest number, not exceeding three; and in distinct ballots the electors of the several States are to vote for Vice-President. That person shall become Vice-President who has the greatest number of electoral votes, if it be a majority of the whole number of electors appointed. If no person have such majority, then the senate shall choose from the two highest numbers on the list the Vice-President. Two thirds of the Senators shall constitute a quorum, and a majority of the whole number shall be necessary to a choice.

“This amendment,” says Judge Story, “has alternately been the subject of praise and blame, and experience alone

can decide whether the changes proposed by it are in all respects for the better, or the worse. In some respects it is a substantial improvement. In the first place, under the original mode, the Senate was restrained from acting until the House of Representatives had made their selection, which, if parties ran high, might be considerably delayed. By the amendment the Senate may proceed to a choice of the Vice-President immediately on ascertaining the returns of the votes. In the next place, under the original mode, if no choice should be made of a President by the House of Representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office, and an *interregnum* would ensue, and a total suspension of the powers of Government. By the amendment, the new Vice-President would in such case act as President. By the original mode, the Senate are to elect the Vice-President by ballot; by the amendment, the mode of choice is left open, so that it may be *viva voce*. Whether this be an improvement, or not, may be doubted."

No special question as to the validity of any of the electoral certificates arose for a number of years, but the day before the opening of the electoral votes in 1805 the Senate passed a resolution that it would "be ready to receive the House of Representatives in the Senate chamber on the 13th of February for the purpose of being present at the opening and counting of votes for the President and Vice-President of the United States." The House of Representatives passed a resolution for the appointment of a committee of the House "to join such committee as might be appointed on the part of the Senate to ascertain and report a mode of examining the votes for President and Vice-President"; but the Senate did not concur and appointed no committee of its own. The House tellers appear, however, to have participated with the teller appointed by the Senate in the examination of the returns at the joint session. The remarks of

Aaron Burr, the Vice-President, to the two Houses assembled in joint meeting have often been quoted as evidence of the lack of power of the presiding officer. He said: "You will now proceed, gentlemen, to count the votes, as the Constitution and laws direct." Little or no weight is to be attached to this utterance, for it is counteracted by the certificate prepared by the Senate on the following day and signed by Burr, wherein it is declared that "the under-written Vice-President of the United States and president of the Senate did in the presence of the Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and Vice-President of the United States."

In 1809, a joint committee was raised in accordance with the precedent set in 1797 and followed in 1801, and the two Houses assembled in the House of Representatives as in 1797. In the discussion in the House over the form of the invitation to the Senate, Randolph objected to the Speaker's vacating his chair, or to any one else taking his place, except by consent of the whole House. Nicholas, of Virginia then moved that when the members of the Senate were introduced the Speaker should relinquish the chair to the president of the Senate; and this was agreed to. Petitions had been previously received in the House of Representatives from citizens of Massachusetts, remonstrating against the mode of appointment of electors in that State "as irregular and unconstitutional." The real difficulty was that the Federalist legislature had passed a resolution reinvesting itself with the appointment of electors, and had refused to submit it to Governor Sullivan on the ground that he had nothing to do with the mode of appointment, which, by the Federal Constitution, was exclusively vested in the legislature. The House sent the petitions to the Senate, where they were laid on the table. In the joint session, objection was made to the returns from one of the States

(Massachusetts) as defective for lack of the governor's certificate, but this was disregarded. One of the votes from Kentucky (that of elector Walton) was missing, but when the letter of the elector explaining his inability to attend the electoral college was brought to the attention of the House of Representatives the day after the count, and a motion was made to amend the record of the proceedings so as to state the reason why the vote of the State was deficient, the motion was negatived.

In 1813, joint committees were again appointed, but no special question arose. Ever since 1809 both Houses have convened in the House of Representatives to witness the electoral count. The number of States in 1817 had risen to nineteen, Indiana having been admitted since the last presidential election. Indiana had adopted a constitution in June, 1816, and was admitted to the Union on December 11th of that year, and the question which arose over the electoral count of 1817 related to the right of Indiana to vote for presidential electors. Until 1817 the message had been worded, "to attend at or in the opening and counting of the votes," but whether by inadvertence or otherwise the House of Representatives on this occasion notified the Senate of its readiness "to proceed agreeably to the mutual resolution of yesterday to open and count the votes for President and Vice-President." Indiana's votes presented a novel question. John W. Taylor, of New York, addressing the Speaker of the House (Clay), objected to the reading and recording of the votes from Indiana, but the Speaker interrupted him with the remark that the two Houses had met for the sole purpose of performing the constitutional duty they were then discharging and that while so acting in joint meeting they could consider no proposition and perform no business not prescribed by the Constitution. Upon motion of Senator Varnum, of Massachusetts the Senate decided to withdraw and did so; and discussion

upon the reception of Indiana's vote proceeded in the House alone, the point of Taylor's objection being that the joint resolution admitting Indiana into the Union was subsequent in date to the day prescribed for the meeting and voting of the electors; that Indiana was not a State on that day, and no more entitled to participate in the election than Missouri or any other Territory. Taylor urged upon the House the importance of a decision upon the question, and proposed a joint resolution declaring that Indiana's votes were illegal and should not be counted. The jealousy with which the House maintained its assumed prerogatives is shown in the suggestion of Bassett, of Virginia, that the resolution should not be joint, lest it become a precedent that might, in case of a tie, "deprive this House of one of its powers by permitting the Senate to participate in this question." No conclusion was reached, for a motion that the votes of the State were properly and legally given and ought to be counted was indefinitely postponed, the Senate invited to return, the joint session resumed, and the votes, including those of Indiana, were counted. Their acceptance had no effect upon the result, as Monroe had 183 electoral votes out of a total of 217 cast; or, exclusive of Indiana, 180 out of 214.<sup>1</sup> The Senate journal was subsequently ordered changed, to efface all record of a somewhat similar debate in that body during the recess. From this period onward, joint sessions were frequently interrupted in order to permit the two Houses separately to debate upon the acceptance or rejection of returns, and were resumed when those discussions were concluded.

Between February, 1817, and February 14, 1821, when the next electoral count took place, new States had been added to the Union: Mississippi, December 10, 1817;

<sup>1</sup> The full electoral vote would have been 221; but three Federalist electors chosen in Maryland, and one of the Delaware electors, did not vote.

Illinois, December 3, 1818; Alabama, December 14, 1819; and Maine, March 15, 1820. Missouri adopted a constitution in July, 1820, but was not formally acknowledged as a State until August 10, 1821. Ever since the organization of the government, it had been the practice to admit a free and a slave State simultaneously, or nearly so, thereby preserving the balance of power in the Senate between the North and the South. Maine had been admitted in 1820, but Missouri's entrance had been delayed by the controversy over her constitution and the Missouri Compromise, and it was not until the adoption of the Compromise that Congress consented to her admission with a constitution favoring slavery. Further delay ensued because of a provision inserted in her constitution that was aimed at forbidding the presence of free negroes or mulattoes within her borders. The House of Representatives insisted that this objectionable feature should be expunged before the State should be allowed to enter the Union, but the Senate objected that the sovereignty of the State would be infringed. A settlement was ultimately reached by which it was agreed that Missouri should be admitted upon the solemn pledge of her Legislature to the next meeting of Congress that her constitution should not be construed to authorize the passage of any act, and that no act should be passed, by which any of the citizens of either of the States, whether white or colored, should be excluded from the enjoyment of any of the privileges and immunities to which they were entitled under the Constitution of the United States. Missouri accepted these conditions. But the agreement between the two Houses was not effected until the end of the session, and debate was in progress when the day for the joint session of the two Houses to count the electoral vote arrived.

Although Missouri was not formally admitted to the Union until August 10, 1821, she elected electors of

President and Vice-President in December, 1820, and transmitted her electoral votes to the capital. The election of Monroe and Tompkins was assured without the votes of Missouri; but so excited was the state of public feeling, and so pronounced the difference of opinion between the House and the Senate, that the two Houses could not be expected to concur in accepting or rejecting the votes. Hence arose a long and acrimonious discussion as to the mode of counting the electoral vote. For the first time in the history of the country, the theory of a *casus omissus* in the Constitution was advanced.

A few days before the joint meeting, Clay offered a resolution in the House of Representatives to the effect that if any objection should be made to the votes of Missouri, the counting or omitting to count which should not essentially change the result of the election, that result should be reported in the following manner:

“Were the votes of Missouri to be counted, the result would be, for A. B., for President of the United States,—votes; if not counted, for A. B., as President of the United States,—votes; but in either event A. B. is elected President of the United States; and in the same manner for Vice-President.”

Clay's argument in the House, in moving the resolution for the “alternative count,” well presents the issue that arose over Missouri's votes.

“Suppose,” he said, “this resolution not adopted, the president of the Senate will proceed to open and count the votes; and would the House allow that officer, singly and alone, thus virtually to decide the question of the legality of the votes? If not, how, then, were they to proceed? Was it to be settled by the decision of the two Houses conjointly, or of the two Houses separately? One House would say the votes ought to be counted, the other that they ought not; and then the votes would be lost altogether.”



If the question were decided in a joint meeting, the majority of the two Houses would unquestionably favor the counting. There was, Clay said, "no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this subject," and he thought "it would be proper, either by some act of derivative legislation or by an amendment of the Constitution itself, to supply the defect." In Clay's argument "that the votes would be lost altogether," unless both Houses agreed they should be counted, there is implied the power of either House to reject the vote of a State. This was the idea at the basis of the famous twenty-second joint rule, adopted by the Houses of Congress in 1865.

After debate the House agreed to the resolution by a sectional vote of 90 to 67, and the Senate, on motion of Barbour, of Virginia, also adopted it. On the 14th of February, just prior to the meeting of the Houses in joint convention, a message from the House informed the Senate, which was dominated by the pro-slavery leaders, that the House had rejected a resolution of the Senate declaring the admission of Missouri into the Union. When the certificates of the Missouri electors were opened, objection was made by Representative Livermore, of New Hampshire to the counting of the votes, and Floyd, of Virginia asked the presiding officer whether or not the votes of Missouri had been counted. The Houses then separated, following the precedent of 1817, and when they reconvened the president of the Senate received the votes of Missouri, and declared, after interruption by Floyd and Randolph, both of whom were pronounced out of order, that the whole number of electors appointed, inclusive of those of Missouri, was 235, or, exclusive of Missouri, 232, and that Mr. Monroe and Mr. Tompkins had each more than a majority of the larger vote, and hence were elected respectively President and Vice-President.

In the recess, the discussion in the House, which arose upon Floyd's motion that Missouri was one of the States of the Union and that her votes ought to be received and counted, disclosed the uncertainty which prevailed regarding the proper practice under the Constitution. The advocates of the acceptance of Missouri's votes, prominent among whom were Randolph and Archer, well aware that the Senate was in sympathy with them, argued that the president of the Senate was to count the votes, and that the House of Representatives had no right to determine whether any vote should be received or rejected. Floyd, in moving that "the electoral votes of Missouri have this day been counted and do constitute a part of the majority of 231 votes given for President and of 218 votes for Vice-President," said: "Let us know whether Missouri be a State of the Union or not. Sir, we cannot take another step without hurling this Government into the gulf of destruction. For one, I say I have gone as far as I can go in the way of compromise; and if there is to be a compromise beyond that point, it must be at the edge of the sword." Randolph supported Floyd at great length and with much vehemence, but finally gave place to Clay, who moved to table Floyd's resolution, which was carried by a large majority. On Clay's motion the Senate was invited to return "to continue the enumeration of votes, according to the joint resolution agreed upon between the two Houses." In the resumed joint session when the votes had all been enumerated, as the president of the Senate was declaring the result, Floyd rose to inquire whether Missouri's votes were to be counted or not. Randolph also tried to interpose, but both were ruled out of order and the election announced amid considerable murmuring, in accordance with the "alternative count" provided for in Clay's and Barbour's resolutions. As the Senate retired from the joint meeting, Randolph was heard addressing the House.

Although wrong in his previous contention that the votes of Missouri should be counted, he correctly declared that there had never before been any other proclamation than one stating "the whole number of votes given in," whereas, upon this occasion, no such annunciation was made. He therefore moved two resolutions: one, that the electoral vote of the "State of Missouri" had that day been counted, and the other that the whole number of electors appointed and votes given had not been announced agreeably to the provisions of the Constitution, and that therefore the proceedings were irregular and illegal. Before a vote could be had upon these resolutions a motion to adjourn was carried.

The second occasion on which the duty of electing a President devolved upon the House of Representatives was in 1825, when John Quincy Adams, Jackson, Clay, and Crawford were the leading candidates for the presidency. It was known throughout the Union in advance of the opening of the certificates in February that no candidate had a majority of the electoral votes, and that the election would be thrown into the House of Representatives, unless votes for one candidate should be transferred to another. Under the Twelfth Amendment the House was limited to a choice from the three highest names upon the list. The usual joint committee of both Houses was raised, but the concurrent resolution, anticipating the result of the electoral vote, provided, as in 1801, that if it should appear on the opening of the certificates and the counting of the votes that no person had a majority of the votes of the whole number of electors appointed, and that a member or members from two thirds of the States were present, the House should immediately proceed by ballot to choose a President from the three highest on the list of the electoral votes.

On February 9, 1825, both the Houses assembled in the House of Representatives. Tazewell, of Vir-

ginia, was appointed a teller for the Senate; Taylor, of New York, and Barbour, of Virginia, were the tellers for the House. The president of the Senate opened the certificates and handed them to the tellers, who recorded the count, which showed that out of 182 electoral votes Adams had 84, Clay 37, Crawford 41, and Jackson 99; Calhoun, receiving 182 electoral votes, was declared elected Vice-President. The House was extremely punctilious about its assumed prerogatives, for its tellers presented themselves in front of the Speaker of the House, and not to the president of the Senate. No one having been elected President, the Senate withdrew, and the House proceeded to ballot for a President, with the result that Adams received the votes of thirteen States, Jackson of seven, and Crawford of four. On no occasion since 1825 has an election for the presidency fallen to the House of Representatives.

The electors, in 1824, were chosen by the Legislature in Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont. In other States, the popular vote, dismissing minor figures, stood as follows: For Jackson, 155,800; Adams, 105,300; Crawford, 44,200; Clay, 46,500. Jackson, as a military hero, was high in public esteem, and a feeling not altogether unreasonable prevailed in many quarters that the large popular plurality for him indicated that he ought to be chosen President. The idea that Jackson, as the most popular candidate, ought to have been selected by the House of Representatives undoubtedly aided in creating the sentiment which was successful in placing him in the presidential chair in 1829.<sup>1</sup> As in 1801, the election in the House of Repre-

<sup>1</sup> The New York Senate, in 1828, passed a series of resolutions declaring that the election of John Quincy Adams by the House of Representatives was in defiance of the clear and undoubted sense of the American people, and in consequence of systematic efforts to prevent a choice by the electoral college, and urging an amendment to the Constitution, giving the choice of President and Vice-President to the people.

sentatives was not conducted without secret intrigues or unjust calumnies. The unfounded charge against Clay is well known, that he bartered votes in his favor to Adams in consideration of the promise of future preferment. And when Adams offered him the portfolio of State, Clay's enemies, unsupported as was the charge of a bargain, professed themselves convinced of its existence, nor did that distinguished patriot ever fully escape from this imputation.<sup>1</sup>

In 1837, the resolution adopted by the two Houses provided for counting Michigan's vote in the alternative. Michigan's case was somewhat like that of Missouri in 1821. The State was admitted by formal proclamation on January 26, 1837. Hence she was not a State when the electors voted, but was such at the date of the electoral count. When the Houses convened in joint meeting, the president of the Senate announced that in pursuance of the provisions of the Constitution he would proceed to open the votes and deliver them to the tellers in order that they might be counted; after the report of the tellers he declared that if the votes of Michigan were to be counted, the result would be, for Martin Van Buren for President of the United States, 170 votes, but with-

<sup>1</sup> The presidential election of 1824 is worthy of note because it brought to an end the practice of caucus nominations for the presidency by members of Congress.

No objections were made, says Stanwood, to any votes at the time of the count; but in May, after the election, Mr. Wilde of Georgia introduced in the House of Representatives a resolution that a message be sent to the Senate requesting copies of all the certificates of electoral votes. In a long speech he gave his reason for making this motion, which was that few of the certificates were strictly correct and in due form. They either did not assert that the electors voted in district ballots for President and Vice-President, or did not report a vote by ballot,—district ballots being required by the Constitution. The resolution was opposed on the ground that it was too late and that "the elections in the States are not subject to revision by Congress, and, on motion, was laid on the table."—Stanwood, *A History of the Presidency*, p. 137.

out the votes of Michigan, 167 votes, and in either event Van Buren was elected.

The effect of the choice by a State of electors declared to be ineligible by the Federal Constitution was first discussed in the proceedings of this year. When the usual resolution for the appointment of a committee was moved in the Senate, an amendment was voted on Clay's motion to authorize the committee

“to inquire into the expediency of ascertaining whether any votes were given at the recent election contrary to the prohibition contained in the second section of the second article of the Constitution; and, if such votes were given, what ought to be done with them; and whether any and what provision ought to be made for securing the faithful observance in future of that section of the Constitution.”

The resolution was approved by the House. The report of the committee, of which Felix Grundy, Henry Clay, and Silas Wright were members on the part of the Senate, contained the following interesting and important clauses:

“The committee are of opinion that the second section of the second article of the Constitution which declares that ‘no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector, ought to be carried, in its whole spirit, into rigid execution, in order to prevent officers of the general Government from bringing their official power to influence the elections of President and Vice-President of the United States. This provision of the Constitution, it is believed, excludes and disqualifies deputy postmasters from the appointment of electors; and the disqualification relates to the time of the appointment, and that a resignation of the office of deputy postmaster, after his appointment as elector, would not entitle him to vote as elector under the Constitution.”

“Should a case occur in which it became necessary to ascertain and determine upon the qualifications of electors of President and Vice-President of the United States, the im-

portant question would be presented: What tribunal would, under the Constitution, be competent to decide? Whether the respective colleges of electors in the different States should decide upon the qualifications of their own members, or Congress should exercise the power, is a question which the committee are of opinion ought to be settled by a permanent provision upon the subject."

In the debate in the House of Representatives upon the report of the joint committee, Mr. Francis Thomas, chairman of the House committee, stated that the committee came unanimously to the conclusion that they (the postmasters in question) were not eligible at the time they were elected and therefore the whole proceeding was vitiated *ab initio*. The notion that the title of an elector *de facto*, an elector who had cast his ballot for President or Vice-President, could not be impeached, was apparently not suggested. No "permanent provision upon the subject" had been made by Congress, and consequently all the perplexing questions suggested by the joint committee came up for decision at that time, without any prior law for their determination. The debates evoked one very telling query. One Senator asked Grundy, the chairman of the Senate committee, what course would have been pursued had the vote of Michigan been essential in the count, to which Grundy replied that he could not "answer a question which the wisest of their predecessors had purposely left undetermined. What might be done under the circumstances adverted to, should they ever occur, the wisdom of the day must decide."<sup>1</sup>

<sup>1</sup> For the first and the only time in the history of the nation the Senate was on this occasion called upon to perform its constitutional duty of electing the Vice-President. The electoral count had showed that Richard M. Johnson, of Kentucky, and Francis Granger, of New York, had each 147 electoral votes, including those of Michigan, or 144 without them, and either count was a majority. The Senate subsequently chose Johnson Vice-President.

The question of the legality of the action of State electors was presented in a different form in 1857, when discussion arose over the vote of Wisconsin. Congress, by the Act of March 1, 1792, had provided that the electors of the several States should meet for the purpose of balloting for President on the first Wednesday of December. The Constitution required that this day should be uniform throughout the United States to "close the opportunity as much as possible against negotiation, intrigue, and corruption." The Wisconsin electors were unable to reach the State capital on the day fixed by law because of a violent snow-storm, but they actually assembled and voted on the next succeeding day. Their certificate was transmitted to the president of the Senate with an explanation of the circumstances that had prevented their meeting on the prescribed day. The usual joint committee was selected "to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election." In the joint meeting of the two Houses of Congress, on February 11, 1857, when the vote from Wisconsin was reached, the tellers reported that the certificate of the electors of that State showed that the electoral vote of that State had not been cast on the day prescribed by law. Objection was made by Letcher, of Virginia, to the reception of the vote, but the presiding officer, Senator Mason, of Virginia, ruled that debate was out of order while the tellers were occupied with the count. When the tellers' statement had been completed, it showed that the five votes of Wisconsin cast for Fremont and Dayton on December 4th were included; and Jones, of Tennessee, one of the tellers, in announcing the report to the joint meeting, declared that the tellers found all the votes regular and cast on the day prescribed by law, except in the case of the votes cast by the electors of the State of Wisconsin, which were cast



on December 4th, instead of December 3d, as prescribed by law. The report then proceeded as follows: "*All* the returns show that James Buchanan, of the State of Pennsylvania, received 174 votes for President of the United States; that John C. Fremont, of the State of California, received—including the votes of Wisconsin—114 votes for President of the United States." Letcher again inquired whether it would now be in order to move to exclude the vote of Wisconsin from the count, but the president again ruled debate not in order. This impelled Senator Crittenden, of Kentucky, to ask whether the chair decided "that Congress, in no form, has power to decide upon the validity or invalidity of a vote." The presiding officer replied that he had made no such ruling, but that, in his opinion, under the law and the concurrent order of the two Houses,

"nothing can be done here, but to count the votes by tellers, and to declare the vote thus counted to the Senate and the House of Representatives sitting in this chamber. What further action may be taken, if any further action should be taken, will devolve upon the properly constituted authorities of the country—the Senate, or the House of Representatives, as the case may be."

He then proceeded to recapitulate the votes as announced to the joint committee, stating that the tellers reported the whole number of electors to be 296, that, according to the vote, "as delivered by the tellers," Buchanan and Breckenridge had each 174 votes and Fremont and Dayton each 114, and thereupon declared Buchanan and Breckenridge President and Vice-President. This provoked objections from political friends and foes in both Houses, Senators Toombs, Butler, and Crittenden being especially earnest in their protest that the effect of this declaration was to include the Wisconsin vote. A spirited debate began, but Senator Cass thereupon objecting that debate

was not permissible in a joint meeting, the presiding officer, after further discussion, so ruled, the Senate returned to its own hall, and the certificate of the tellers was never read to the joint session. It has been often said that the president of the Senate on this occasion counted the votes of Wisconsin, but the record shows that he disclaimed authority to count, and that all he did was to announce what votes had been received by the tellers, without question of their legality, and to declare the result to the two Houses.<sup>1</sup> As Wisconsin's vote was of no moment as affecting the election, this clever evasion met with ultimate acquiescence, although a violent debate arose in each House when the joint session was dissolved.

A number of Republicans, prominent among whom were Hale, in the Senate, and Washburn, of Maine, in the House, insisted that the vote of Wisconsin ought to be counted. Seward expressed his doubt but sustained the action of the chair. Hale argued that as the people of Wisconsin had done all in their power to express their voice in the presidential election, the penalty of disfranchisement should not be visited upon them, since it was through unavoidable accident that the electors had failed to arrive at the State capital on December 3d. Crittenden and Thompson, of Kentucky, affirmed the Constitution to be inexorable in its requirement that all the votes must be given on a particular day. To the majority of the Senate the more important questions were whether

<sup>1</sup> "In reference to one State, the State of Wisconsin, the tellers have reported that the vote of that State was cast on a day different from that prescribed by law. The presiding officer is not aware that what effect, if any, such a difference would have on the vote of that State can be decided by him. Nor is it his duty to decide upon whom devolves the duty of determining what the effect may be. The presiding officer is further required [under the concurrent rules of the two Houses] to declare the whole vote as given. That duty he has discharged. He is further required to declare who has received a majority of the whole vote from the list delivered to him by the tellers, and to declare such person elected President or Vice-President as the case may be."

the President had in fact counted Wisconsin's vote, which he maintained he had not (and in this, numerous Senators supported him), and, especially, where the power to count resided. Upon this last question the widest possible differences of opinion were developed in the two Houses. It was argued that the president of the Senate was to determine what votes should be counted or rejected, and that it was his duty, and his duty alone, to ascertain whether they were valid votes. To others, such a view involved a usurpation by that officer of the powers of Congress, and would make the president of the Senate an authority greater than Congress itself. Some claimed that as the House alone was to elect, in case no candidate had a majority of electoral votes, that body was the sole tribunal to pass upon Wisconsin's vote, while others argued that the two Houses sitting separately were the constitutional arbiters of all such questions. The theory first suggested in the debates of 1800 was again presented, that the Houses in joint session formed one body, in which a vote should be had *per capita*. Senator Pugh, of Ohio, after arguing that at no stage of the joint proceedings had dissent from the reception of the vote been held to be in order, said:

"I believe the two Houses assembled together were a *board of canvassers* organized by the Constitution for the express purpose of counting these votes. The whole number of Senators and Representatives taken together is equal to the whole number of electors in all the colleges. . . . All the States, if they had voted there yesterday through their Senators and Representatives, would have exercised the precise power which they exercised in the election of President";

and have cast their votes *per capita*, as the Representatives and Senators from each State had the same number of votes as the State in the electoral college. Mallory, of Kentucky, answered that this was introducing a third

mode of electing the President, unknown to the Constitution. The view was strongly advocated that, as the law then stood there existed no competent authority to decide upon the validity or invalidity of the votes. Charles E. Stuart, of Michigan, and Benjamin, of Louisiana, urged the Senate to pass a general act providing that votes not cast on the day required by law should not be counted. Stuart, maintaining that the presiding officer had simply fulfilled his duty in the announcement he had made as to the vote, thus put the dilemma:

“ Either the presiding officer is bound to count all the votes that are certified to him by the State authorities, or else the presiding officer, under the present law, and he alone, has the right to decide whether he will count or reject them. . . . In either event, it will be conceded, I think, by every Senator, that it is a dangerous power. It is dangerous to leave it to the certifying officers or the electors themselves, who make the certificates on the part of the States; it is dangerous to leave it in the hands of the presiding officer of the Senate; but in one or the other it rests; and I submit that to undertake to say that it rests in the two Houses assembled together *en masse* to decide such a question would fall but little short of revolution.”

The vital point was touched by Stuart when he declared that it was “imperative on Congress by legislation to determine definitely what should be done in such a case,” and in this view Hale, Collamer, Seward, and others joined. Thompson, of Kentucky, asserted that the Senate was the counting power, “and the House of Representatives are admitted to be present at the count to prevent a combination, a clandestine operation, a secret measure, a *coup d'état*”; and he added later, that the House could “fall back upon their parliamentary or revolutionary rights, whatever they were, if we did wrong.” In the House, Humphrey Marshall, of Ken-

tucky, arguing that the president of the Senate had usurped the right to count the votes, denied that a vote could be taken *per capita*, and insisted that until the House of Representatives agreed to the vote offered it was not constitutionally counted, nor could the president of the Senate declare a result to which the House had not agreed. Washburn thought there was a *casus omissus* and that

"it is of the highest importance that there should be some legislation on this subject. All that we can now do is to acquiesce in the decision that has been made, and to set ourselves to work immediately for the passage of a law which will prevent any trouble or difficulty of this kind in the future. I received a letter but a few days ago from a gentleman eminent for his wisdom and ability, who stated therein that Chancellor Kent, of New York, had told him that here was clearly a *casus omissus*; that there was no power either in the House or Senate or in a joint convention, to interfere and participate authoritatively in counting and declaring the votes and deciding upon their validity; and he said that the Chancellor added that he feared the time might come when the country would be shaken to its centre on this point. We cannot," he eloquently concluded, "over-estimate the importance of such a law [a general law]. Let the election of President depend upon the vote of a single State, and let that vote be contested in earnest, what weight or power would the decision of one man have with the country, or would that of Congress possess, acting arbitrarily, without law, without rules and orders of proceeding, and with a view to making the President, rather than ascertaining who had been duly elected by the people. Suppose the will of the people defeated by a partisan president of the Senate, or a partisan majority of Congress, . . . what shall save us from revolution?"

The debate ran through two days in each House, but was unproductive of any result. It was closed by a reso-

lution, emanating from the joint committee, of notification to the successful candidates of their election.

The antagonisms of opinion were hopelessly irreconcilable. While the wiser and cooler heads saw the necessity of general legislation to settle all questions arising upon the count, such legislation was not then possible. The count had not yet vitally affected the election, and each Congress, realizing the difficulties of framing a general enactment, was glad to postpone the task. Thirty years after the controversy over the Wisconsin vote Congress first passed such a law, the merit of which yet remains to be tested. But before that law could be enacted, an occasion arose when alternative counting was out of the question, and the nation, in the peril so clearly foreseen by Chancellor Kent, had to devise an emergency plan to escape anarchy.

## CHAPTER III

### THREE THEORIES OF COUNTING—THE BILL OF 1800

**B**EFORE reviewing the difficulties which arose in connection with the electoral count after 1857, it may be well to rehearse concisely the course of development from 1789 to 1857. Three theories or interpretations of the clause of the Constitution in regard to the opening of the certificates and counting of the votes have held sway at different times, says McKnight in his treatise upon *The Electoral System of the United States* :

"The first is that the president of the Senate shall count the votes; the second, that there is a *casus omissus* in that regard; and the third is, that the two Houses present shall count. . . . From the time of the first Congress in 1789 to the year 1821, history shows that the unquestioned custom was for the president of the Senate to 'declare' the votes officially, while counting was, what the language of the law would seem to convey clearly enough, simple enumeration."

During this period, McKnight remarks, the framers of the Constitution occupied the seats of honor in the nation, and particularly during the first fifteen years were conspicuous in the halls of Congress. "From 1821 to 1861, it was generally held that a *casus omissus* existed in the Constitution, and that no one was empowered to 'count'; whilst counting was used in the broader and unwarranted sense of 'canvassing.'" But in the early practice no difficulties arose to make counting more than

simple enumeration; whereas, in 1821, 1837, and 1857, questions touching the validity of the certificates transmitted to the Senate required a determination by some competent authority, in accordance with some clearly applicable law, as well as a simple count. As was repeatedly asked in debates, when the Constitution says the votes shall be counted, what votes are intended? While some laid stress on the word "count," others put the emphasis on the word "votes." If votes claimed to be irregular or invalid were opened, their validity or invalidity had to be settled before counting could properly take place. The third theory, which according to McKnight, became operative in 1861, is that Congress possesses the right to count, *i. e.*, to enumerate as "an affirmative act," and "that the votes are, of course, the legal votes, which thus devolves on Congress the power also to determine their legality." McKnight's view is that this assumption by Congress is an unwarranted usurpation. One of the clearest and most sagacious of our historians, the late Alexander Johnston, says:

"In this first period, there is no instance of a declaration of the electoral canvass by any other power than the president of the Senate, and the only open attempt to pervert the system was the Federalist bill of 1800. As the certificates which the president of the Senate, in the absence of an authenticating law, decided to be valid were opened, he passed them to the tellers appointed by the two Houses, who 'counted' them in the proper meaning of the word. The certificates of election which were made out by order of Congress from 1797 until 1821, all contained the distinct affirmation that 'the president of the Senate did, in the presence of the said Senate and House of Representatives, open all the certificates *and count all the votes* of the electors.'"

But no case of double or contested returns occurred. As



exhibiting the growth of the claim of congressional power Johnston says that

“an amendment to the Constitution was introduced in Congress in January and February, 1798, for the purpose, among others, of giving Congress the very power of decision upon ‘contests’ which it now exercises without such an amendment, but this was not adopted, nor was it inserted in the Twelfth Amendment.”

The progressive changes of language in the messages from the two Houses announcing their readiness to attend the count are, he says, worthy of notice.

“They are as follows: (1793-1805) that they are ready to meet one another ‘to attend *at* the opening and counting of the votes’; (1809 and 1813) ‘to attend *in* the opening and counting of the votes’; (1817) ‘to *proceed in* opening the certificates and counting the votes’ or ‘to proceed to open and count the votes,’ the former being that of the Senate and the latter that of the House. These changes are landmarks.”

Johnston argues cogently that the views of Pinckney in 1800, and of John Randolph in 1821, were sound, and that Congress doubly violated the Constitution in 1821, “first by usurping control of the canvass and second by refusing to fulfil the charge that the ‘votes shall then be counted,’” for the count of the votes was evaded and an “alternative count” substituted. And the evasion was repeated in 1837 and again in 1857. It was predicted again and again in the course of debates that some adequate general legislation was imperative upon Congress, because the occasion might arise (as it did in 1877) when the acceptance or rejection of a contested vote would determine the election. From the early period it will be found also that there was a gradual assumption of authority by the tellers, for whose appointment there is no

warrant in the Constitution, who were originally merely clerical officers appointed to facilitate the work of the president of the Senate and examine and add up the votes. The contrary theory that the power to count belongs to the two Houses of Congress in the joint meeting provided for in the Constitution has been forcibly presented in the following terms:

“ The exclusive jurisdiction of the two Houses to count the electoral votes by their own servants and under such instructions as they may deem proper to give on occasions arising during the counting, or by previous concurrent orders, or by standing joint rules, or by the formal enactments of law, has been asserted from the beginning of the government; that exclusive jurisdiction has been exercised at every presidential election from 1793, when a regular procedure was first established, until and including the last count of electoral votes in 1873. It was exercised by concurrent orders of the two Houses from 1793 to 1865, and by a standing joint rule in 1865, 1869, and 1873. Every counting at these twenty-one successive presidential elections has been conducted under and governed by the regulations thus imposed. These regulations have prescribed every step in the procedure; have defined and regulated the powers of every person who has participated in any ministerial service in the transaction. They have controlled every act of the president of the Senate in respect to the counting, except the single act of opening the packages of the electoral votes transmitted to him by the colleges, which is a special duty imposed on him by the Constitution. During all this long period, the exclusive jurisdiction of the two Houses, exercised upon numerous successive occasions, has never, in a single instance, been the subject of denial, dispute, or question.

“ The president of the Senate, although he has regularly, in person or by some substitute appointed by the Senate, performed the constitutional duty of opening the electoral votes, has never, on any occasion, or in any single instance, attempted

to go a step beyond that narrow and limited function. . . . The two Houses have also asserted the right to prescribe a permanent method of counting the electoral votes.”<sup>1</sup>

These arguments show the opposing attitude of jurists and constitutional lawyers, both in and out of Congress, from the inception of the Government almost to the present day.

An act of Congress declaring what constitutes a State and when a Territory has ripened into Statehood would have prevented all controversy over Missouri's vote and so also a law prescribing whether or not the Constitution is mandatory in requiring all electors to vote on the same day would have rendered the turmoil over Wisconsin's vote impossible. The simple act of counting in accordance with such a previously enacted law would then have been nothing more than a ceremony even had it been performed by the president of the Senate. If it would have been a usurpation for the president of the Senate to decide, in the absence of law, whether Missouri was entitled to vote or whether the Wisconsin electors had cast valid ballots, it would have been equally a usurpation for Congress in the joint meeting of the Houses to undertake to answer these questions. The confusion in the minds of statesmen arose from the absence of a general law, but no such law was possible until a majority in Congress agreed as to the true constitutional depositary of the counting power and as to the constitutional subjects of legislation.

The bill of 1800, the title of which was “An act prescribing the mode of deciding disputed elections of President and Vice-President” was in reality the germ from which eventually sprang the twenty-second joint rule, the Morton bill of 1873 to govern the electoral count, the Electoral Commission bill of 1877, and the act

<sup>1</sup> *The Presidential Counts*, by D. Appleton & Co., xli.

of February, 1887. The bill originated in the Senate, which at that time was under Federalist control, and it was designed to circumvent the ambition of the presiding officer of that body. Yet its strongest and most eloquent opponent was a member of the Federalist party. The bill was ultimately defeated, because the amendments added in the House of Representatives so completely revolutionized and obliterated some of its radical features, as to frustrate the purpose for which it was drawn. The antagonism between the two Houses reveals the struggle for mastery of the electoral count. The Senate plan would have vested the final control in the Senate. Whether the motive was sinister or not, such would have been the result. The House struck out from the bill all those features which gave the Senate control, and the consequence was that the bill failed of passage. The debate is unfortunately very scantily reported in the *Annals of Congress*. The Republicans generally were of the opinion that the bill was aimed directly at the Pennsylvania vote, which, it was assumed, would be cast by the Legislature of that State. Duane charged in the *Aurora* that its purpose was to enable the Federal majority in Congress through a committee to reject that vote as irregular. The importance of Pennsylvania's vote was recognized by both parties. "If," wrote Jefferson to Madison on March 8th, "Pennsylvania votes, then either Jersey or New York giving a Republican vote, decides the election. If Pennsylvania does not vote, then New York determines the election."

On January 23, 1800, James Ross, of Pennsylvania, whom the Federalists of that State had unsuccessfully supported for governor the preceding year, offered a resolution in the Senate that a committee be appointed to consider whether any and what provisions ought to be made by law for deciding disputed elections of President and Vice-President of the United States; and for

determining the legality or illegality of the votes given for those officers in the different States. It is evident that the votes referred to in the resolution were not popular, but electoral votes; in a majority of the States electors were chosen by the Legislature. The resolution was passed after debate. Brown, of Kentucky, thought that Congress had no right to legislate upon the subject. If the provisions of the Constitution were incomplete or defective, the remedy lay in recommending an amendment to that instrument. Ross replied that the Constitution made no provision upon the subject, but merely directed that after the reception of the votes the certificates should be opened and the votes counted. Suppose, said he, persons should claim to be electors who had never been properly appointed. Should their vote be received? Suppose they should vote for a person to be President who had not the age required by the Constitution, or who had not been long enough a citizen of the United States, or for two persons who were both citizens of the same State. What would happen in such a case? He therefore considered it their duty to make provision for the contingency, and he believed this could be done by an act of Congress.

Samuel Dexter, of Massachusetts, one of the foremost lawyers of his age, supporting Ross, argued that the Constitution gave Congress the power to enact the necessary legislation. The power was contained in the eighth section of the first article, and is this: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Samuel Livermore, of New Hampshire, concurring with Dexter, declared he never felt less doubt on any subject than upon this of the power of Congress. But Abraham Baldwin, of Georgia, who was one of the four members

of the Senate of 1800 that had been delegates to the constitutional convention of 1787, found nothing to criticise in the practice and proceedings of the electoral college or in the count of the votes. When Senators and Representatives met together in joint session, their only office was "to judge of the authentication of the act of the electors, and then to proceed and count the vote as directed." If a body of the electors of all the States had been directed by the Constitution to assemble in one place, he took it for granted that none of the questions underlying the legislation would have occurred. Every one would have acknowledged that all these were to be settled in that assembly. That it had been "deemed more safe by the Constitution to form them into different electoral colleges, to be assembled in the several States, does not at all alter the nature or distinctness of their powers or subject them any more to the control of the other departments of the Government." He did not, however, content himself with eulogy of the existing methods, but observed further that, if such radical and important changes were to be made as the resolution contemplated, they must be made by proposing an amendment to the Constitution, for they could not be made by law without violating the Constitution. His argument is of profound interest, not only as coming from a member of the convention of 1787, but as containing the substance of the views of those who have opposed legislation on the ground that it is inadequate and without warrant in the organic law. In answer to Dexter, who had invoked the clause at the close of the eighth section of Article I. of the Constitution, Baldwin denied that the section "could be extended to this case." That section, he continued,

"speaks of the use of the powers vested by the Constitution—this resolution relates to the formation of a competent and

essential part of the government itself; that speaks of the movements of the government after it is organized; this relates to the organization of the executive branch, and is therefore clearly a constitutional work, and to be done, if at all, in the manner pointed out by the Constitution, by proposing an article of amendment to the Constitution on that subject."

The constitutionality of the bill was assailed with great ability by Charles C. Pinckney, of South Carolina, who had been a very active member of the convention of 1787. "The value of Mr. Pinckney's defence of the Constitution," says McKnight, "is enhanced an hundredfold by the fact that he, a Federalist and a candidate for President on that ticket in the fall of this same year, was the unrelenting opponent of a political measure offered by his own party." Pinckney's speech, according to the Philadelphia *Aurora*, was generally allowed to have been equal in eloquence and strength of reasoning to anything ever delivered in the halls of Congress. He spoke unquestionably with profound conviction. The Constitution, he truly maintained, had left the exclusive control of the election with the States. In case the State Legislatures should neglect or refuse to elect, there was no power to compel them, nor to force them to legislate as to the manner in which electors should be chosen. There is not, he said,

"a single word in the Constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions. I well remember," he continued, "it was the object [of the Constitutional Convention] to give to Congress no interference in or control over the election of President. . . . It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention the right to object to any votes, or even to question whether they were constitutionally or properly given."

The few provisions of the Constitution as to the qualifications of electors or eligibility of candidates would, he felt convinced, be faithfully observed by the States in the performance of their function of appointing electors. The point that if two different sets of electors should insist that they were constitutionally elected, or that if double returns should be transmitted, one certified by the governor of the State, the other not, there was no power, unless the States legislated affirmatively or Congress passed some appropriate enactment, to remedy the trouble and decide between the conflicting claims, Pinckney did not meet, unless by the expression of his hope that the States, in the exercise of their prerogatives, would do their duty. It

“ would be safer and less injurious to the interests of the people that these few irregular votes, if transmitted and certified by an executive, shall be received and counted, than that a new and unknown power like this should be created, under whose control not a few, but every vote that is given, must be reviewed, and received or rejected as they decree. If the bill is not passed, we are to depend, as we have hitherto done, on the attachment of the States, and the good sense and integrity of their executives.”

The law of 1792, in his judgment, went to the verge of the power of Congress. His criticisms of that feature of the Senate bill which provided for the taking of testimony were acute and just. It was also a great mistake to propose that the judiciary, an altogether separate branch of the Government, should have anything to do with the electoral count, and the remedy by taking testimony would have been found utterly impracticable.

“ It is very important,” said Pinckney, “ in deciding on the bill before you, to peruse this act of [1792] with great attention; to recollect by whom, and when, and under what



circumstances, it was made. This law was passed in 1792, when a number of able and well-informed men, who have been since appointed to some of your most respectable situations at home and abroad, and many who have voluntarily retired with deserved and well-earned honor to private life, filled the seats of both Houses of Congress; when the executive authority was held by General Washington, for whom your whole nation at present mourns. . . . And here, sir, let me ask whether from a Congress thus ably formed, and from an executive thus discerning and independent, as much knowledge of the Constitution, its precise directions, and the agency it intended Congress to have in counting the votes and declaring the President, were not to have been expected, as from the present. Were not the then executive, and a number of the members of both Houses, members of the convention which framed the Constitution; and if it intended to give to Congress, or authorize them to delegate to a committee of their body, powers contemplated by this bill, could the Congress or the President of 1792 have been so extremely uninformed, and indeed ignorant of its meaning and of their duty, as not to have known it?"

But the experience of intervening years has taught the nation that some legislation supplementing that of 1792 is necessary, or the Constitution is defective. As soon as Pinckney had finished his address, the vote was taken on the passage of the bill, which was carried by the close vote of 16 to 12, Baldwin, Langdon, and Pinckney being among those recorded against it.

The bill of 1800, as reported to the Senate, provided that on the day prior to the opening of the electoral votes each House should choose by ballot six persons, who, with the chief justice of the United States (or one of the associate justices), should form a grand committee. The powers of the grand committee are thus set forth in Section 8 of the bill:

"Sec. 8. The grand committee shall have power to inquire,

examine, decide, and report upon the constitutional qualifications of persons voted for as President and Vice-President of the United States, upon the constitutional qualifications of the electors appointed by the different States, and whether their appointment was authorized by the State Legislature or not; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes, or against the truth of their returns, or the time, place, or manner of giving their votes; *Provided* always that no petition or exception shall be granted, allowed, or considered by the sitting grand committee, which has for its object to dispute or draw into question the number of votes given for an elector in any of the States, or the fact whether an elector was chosen by a majority of the votes in his State or district."

The grand committee was directed by the bill to make a report showing the number of legal electoral votes for each person, the number rejected and the reason for rejection. The report of the majority of the committee, which was to be reached in secret session, was to decide finally all disputes and to determine the number of legal votes. Under such a measure Congress was called upon to resign its functions, if it had any, over the count, to a committee so constituted that the Senate would always control its decisions. Evidence of the ambition of the Senate to become the deciding factor in any disputed presidential election had appeared in some of the amendments which, even at that early day, had been proposed to the method of election: Humphrey Marshall, of Kentucky in the Senate, on January 24, 1798, had offered an amendment proposing among other things that the electors distinguish in the ballots between President and Vice-President and that the Senate elect the Vice-President, should the electors reach no choice as to that officer. The third section of his amendment may be taken as an index of the spirit pervading that section of

the bill of 1800 which provides for the eventual control of the grand committee, and was as follows: "Should any contest arise relative to any vote for President, the same shall be determined by the Senate, or should any contest arise relating to any vote for Vice-President, the same shall be determined by the House of Representatives." The grand committee was empowered to send for persons, papers, and records, to administer oaths, and to punish contumacious witnesses, as fully and absolutely as the Supreme Court of the United States is able to do in suits therein.

The bill as passed by the Senate is substantially the bill reported to that body, the only important change being in the composition of the grand committee. The Senate decided (and rightly) that the Supreme Court should have nothing to do with the count. The bill provided that each House should choose six of its members; that the Senate should select three others of its own number, from whom the House of Representatives should choose one, to constitute the thirteenth member of the grand committee. In other words, the Senate bill gave that body the control of the grand committee and then vested in the committee the final and absolute decision of all questions touching disputed returns. Jonathan Dayton alone, of the members of the Senate who had been delegates to the constitutional convention of 1787, voted for the bill.

The bill, as Jefferson wrote, "underwent a revolution in the House of Representatives." John Marshall, who, in the following year, was appointed by President Adams Chief Justice of the Supreme Court of the United States, was chairman of the select committee of the House to which the bill was referred. Marshall expressed doubt upon two points, whether the Senate should name the chairman of the grand committee and whether the opinion of that committee should be final. If we may rely

upon Jefferson,<sup>1</sup> who was keenly interested in the fate of the bill,

“Marshall made a dexterous manœuvre; he declared against the constitutionality of the Senate’s bill, and proposed that the right of decision of their grand committee should be controllable by the concurrent votes of the two Houses of Congress; but to stand good if not rejected by a concurrent vote. You will readily estimate,” wrote Jefferson, “the amount of this sort of control,” and he continued: “The committee of the House of Representatives, however, took from the committee the right of giving any opinion, requiring them to report facts only, and that the votes returned by the States should be counted, unless reported by a concurrent vote of both Houses.”

What the House committee actually did was to reduce the functions of the grand committee to those of a simple committee to take testimony and report to both Houses. But the most momentous change which the House made was in the eighth section of the bill, as to the procedure in the Houses upon a disputed return. The vital expression of the House bill was: “And if the two Houses have concurred in rejecting the vote or votes objected to, such vote or votes shall not be counted, but unless both Houses concur, such vote or votes shall be counted.”

The amended bill passed the House on May 2d, by a vote of 52 to 37, and was returned to the Senate, which, on May 8th, amended by substituting the word “admitting” for “rejecting.” To this proposed amendment of the Senate the House refused to agree, by a vote, on May 9th, of 73 to 15, Harper, of South Carolina, and Bayard, of Delaware, both arguing that the Senate amendment had very materially changed the principle of the bill, inasmuch as it would put it in the power of one or two members of either House to require the majority

<sup>1</sup> Jefferson to Edward Livingston, 1800. Randall’s *Jefferson*, vol. ii, 526.

of both Houses to admit a vote or votes; in default of which the whole vote of a State might be rejected. This, it was argued, was contrary to the maturely expressed will of the House. The Senate refusing to recede, the bill was lost. Thus the effort to provide a method for the settlement of disputes in regard to electoral returns resulted in failure, because of an irreconcilable conflict between the two Houses upon the question whether one House alone had the right to reject the vote of a State or the power resided concurrently in the two Houses. It may seem extraordinary that the Federalists, who had a majority in the House of Representatives, could not pass the Ross bill through that body. Jefferson, in commenting upon their inability to "carry a single strong measure through the Lower House, during the whole session," wrote to Madison that "when they met it was believed they had a majority of twenty, but many of these were new and moderate men and soon saw the true character of the party, to which they had been well disposed when at a distance."

While the subject was under consideration in the House, Albert Gallatin disapproved of the provision incorporated in the House bill that, in case of doubt, the two Houses should separate to their respective chambers to consider the votes which were objected to, and proposed as a substitute that if questions should arise at the counting of the votes, they should be submitted, without debate, to be decided by a majority of the members of both Houses present in the joint session. His motion evoked a long debate, but was defeated by the very close vote of 46 to 44. The idea that the two Houses assembled in joint session have lost their separate identity, and are merged in one body having constitutional jurisdiction over all questions touching the electoral count, reappeared in the debates in 1857 and 1876, and in various forms was broached in the debates culminating

in the Act of 1887. The propriety of either House retiring from the joint session has often been discussed. The Constitution requires the count to proceed in the presence of the two Houses, and it has been persuasively argued that no step can be taken unless both Houses are present.

In 1824, Martin Van Buren, as the organ of the Judiciary Committee of the Senate, in response to a resolution passed December 16, 1823, that the committee ascertain and report what the public interest and the public safety required in regard to the count of electoral votes, reported a bill. This bill, in which, as Senator Conkling said, in 1877, "the *ultra* pretensions of the Senate were abandoned," passed the Senate on April 10th, but not without objection by Macon, of North Carolina, one of the ablest Senators of that day, that it went beyond the constitutional power of Congress. The House referred the bill to its Committee on Judiciary, of which Webster was the chairman, and it was reported back without amendment by Webster, but no further action was taken. The bill provided, among other things, that on the first occasion when the votes were to be counted, the joint meeting should be held in the hall of the House, and on all future occasions "in the centre room of the capitol," which, said Senator Conkling in the debate of January, 1877, was the rotunda. "They were to meet under the dome of the capitol on neutral ground between the two halls." As to the procedure the bill prescribed that the packet containing the certificates from the electors of each State should then be opened by the president of the Senate, beginning with the State of New Hampshire, and

"if no exceptions are taken thereto, all the votes contained in such certificates shall be counted; but if any exception be taken, the person taking the same shall state it in writing,

directly and not argumentatively, and sign his name thereto; and, if the exception be seconded, each House . . . shall immediately retire, without question or debate, to its own department, and shall take the question on the exception, without debate, by ayes and noes. So soon as the question shall be taken in either House, a message shall be sent to the other informing them of the decision of the question, and that the House sending the message is prepared to resume the count; and when such message shall have been received by both Houses, they shall again meet in the same room as before, and count shall be resumed. And if the two Houses have concurred in rejecting the vote or votes objected thereto, such vote or votes shall not be counted; but unless both Houses concur, such vote or votes shall be counted."

The bill of 1800 having failed because of the hopeless division of opinion between the two Houses of Congress, and differences of view as to the respective powers of the Houses developing from time to time, and a like fate overtaking the bill of 1824, no further legislation was attempted by Congress until 1865, with the single exception of the Act of 1845.<sup>1</sup>

<sup>1</sup> In 1845, for the first time, the words "college of electors," or "electoral college," appear in any legislation. They are first found in the debates, about 1800.

## CHAPTER IV

### COUNTING, 1861-1873—THE MORTON BILL

**W**HEN the two Houses met for the purpose of opening the electoral certificates on February 13, 1861, eleven of the States of the Union had seceded and had attempted to organize a government known as the Confederate States of America. Returns had been transmitted from the seceding States to the president of the Senate in the preceding December, but upon the theory that there was "an indissoluble union of indestructible States," these States were still within the Union, and their electoral votes, having been given while they were constituent parts of the Union, were entitled to be counted, and all the votes were, in fact, counted. The usual joint committee was appointed. Nothing occurred to mar the tranquillity of the proceedings. The president of the Senate, Breckenridge, of Kentucky, who declared the result, subsequently became a major-general in the Confederate army.

In 1864, parts of Louisiana and Tennessee having been occupied by the forces of the United States, President Lincoln, in conformity with the proclamation issued by him in August, 1861, authorized State governments to be organized, and these appointed presidential electors in November, 1864. The electors in these States had assembled, voted, and transmitted certificates to the president of the Senate. The leaders in Congress foresaw a renewal of the fierce discussion of 1857 regarding



the validity of these certificates, unless some measure were adopted to foreclose debate. As Senator Edmunds some years later stated in the Senate, they were anxious to provide against the contingency that the Southern Confederacy might send votes to the president of the Senate, "adequate with the Democratic returns from loyal States to reject Mr. Lincoln and seat General McClellan, who was supposed to be more favorable to their views." Hence they framed a joint resolution, which was passed by both Houses. After reciting that the inhabitants of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee, had rebelled against the Government of the United States, had continued in a state of armed rebellion for more than three years and were in such a state of armed rebellion on the 8th of November, 1864,<sup>1</sup> that no valid election for President and Vice-President was held therein on said day, the resolution declared said States not entitled to representation in the electoral college for choice of President and Vice-President of the United States for the term of office commencing on March 4, 1865; it further provided that no electoral votes from either of those States should be received or counted. Mr. Lincoln delayed action upon the resolution until the day fixed by law for the opening of the electoral college. It was not until the very day of the count "that he conquered his reluctance," says Morse, "and when at last he did so, and decided to sign the resolution, he at the same time carefully made his position plain by a brief message." He returned the resolution, with his formal approval, to the House from which it emanated, in a message disclaiming all right of the executive to interfere in any way in the matter of canvassing or counting the electoral vote, and asserting his

<sup>1</sup> Added in the Senate, because insurrection had then ceased in Louisiana, and Tennessee and these two States had sent in electoral votes.

conviction that the two Houses of Congress have complete power to exclude from counting all electoral votes deemed by them to be illegal. Mr. Lincoln, in renouncing all prerogative of the executive to interfere, may not have intended to discriminate between conflicting claims as to the exact lodgment of the power to count the votes; sufficient for him that the executive, under the guise of a joint resolution, should have no concern with the count. It has been asserted that Lincoln's delay in approving the joint resolution led to the adoption of the famous twenty-second joint rule. Upon this point, Senator Edmunds made this interesting statement in the Senate on December 11, 1876:

"The twenty-second joint rule sprang into existence one morning here. . . . Nobody knew exactly who the father of it was. I think I have seen it stated that the Senator who contrived it, a few years afterwards, expressed his great astonishment that any such thing should ever have been presented and adopted. A very distinguished Senator, once the chairman of the Committee on the Judiciary of this body, indeed for a very long time and still a prominent statesman in the central part of the continent, expressed his infinite surprise that such a thing as that should be in existence; and yet on looking it up it turned out that he was the identical person who wrote it and put it through."

Senator Edmunds subsequently mentioned Lyman Trumbull, of Illinois, by name, as the author of the resolution. Trumbull, who was chairman of the committee of the Senate in January, 1865, appointed to ascertain and report a mode of examining the votes for President and Vice-President, had actually moved the passage of the rule. This rule did not require the President's signature, being simply a rule of the two Houses, and was probably substituted because of alarm lest President Lincoln might not sign the joint resolution. After the usual language

as to the assembling of both Houses, the appointment of tellers and their duties, and the reading of the certificates by the tellers, the rule provided that if, upon the reading of any certificate, any question should be raised as to the vote therein certified,

"the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision; *and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurring votes of the two Houses.*"

This did not require the President's signature and seems to have been put in this shape for that reason. It was objected in the Senate that under this rule either one of the two Houses might disfranchise a State.

"Suppose," said Cowan, of Pennsylvania, "there is a question then whether the votes of Louisiana shall be counted. The Senate retires to its chamber, and decides that it shall; the House of Representatives organizes and decides that it shall not; how is the question then to be decided? . . . I think it belongs to the Houses in joint convention to decide that question when it arises. It is evident that they are there with some power and authority over it. . . . Any one [either] of the Houses could disfranchise a State,"

under this rule. To this Trumbull replied that if Cowan meant the joint vote was to be taken *per capita*, there was no constitutional authority for such action, and such a course had never been pursued since the Government was formed; but he failed to meet Cowan's criticism upon the rule that:

"If there was a partisan majority in the Senate opposed to counting the votes of a particular State, all it had to do would

be to stand firmly upon its resolve that they should not be counted, and that State would be disfranchised by the act of the Senate alone. The House would have the same privilege precisely. Was that ever contemplated?"

To this Trumbull rather lamely rejoined that the obstinate refusal of either House to attend the joint session would break up the Government, and one imaginary case was as likely to happen as the other.

The canvass, for such it had come to be, of the electoral vote took place on February 8, 1865, ostensibly under both the joint resolution and the joint rule. When the tellers had completed their report, which made no mention of the votes of Louisiana or Tennessee, Senator Cowan inquired of the Vice-President whether there were any further returns to be counted; for, said the Senator, "if there are, I would inquire why they are not submitted to this body in joint convention, which is alone capable of determining whether they should be counted or not." The Vice-President replied: "The chair has in his possession returns from the States of Louisiana and Tennessee, but, in obedience to the law of the land, the chair holds it to be his duty not to present them to the joint convention." Cowan then asked whether the joint resolution had received executive approval, and forced the chair to acknowledge that it had. The twenty-second joint rule, although in force, was not operative in the count of 1865, for Louisiana and Tennessee were excluded from the count under the terms of the joint resolution which had just received the President's signature. Such a rule was a perversion of the powers of Congress. A rule is to govern the conduct and proceedings of bodies, but is never designed as a substitute for legislation. Its inappropriateness is apparent in the fact that its operations were negative, and enabled one House to check the other. Applied in strictness it would have brought the

Government to an end, for if one House, for partisan advantage, might reject the returns of certain States, the other, if of opposite politics and actuated by the same kind of impulses, might reject the votes of other States.

"The power assumed by Congress in the adoption of this joint resolution [rule]," says Stanwood, "has frequently been assailed as an invention of the Republican party, and as a power never before asserted. But by reference to the proceedings in Congress in the year 1800 it will be seen that a bill making permanent provision for counting the electoral vote failed only because the Senate then insisted that either branch of Congress might reject a vote, while the House of Representatives maintained that it should be rejected only by a concurrent vote."

The bill of 1800 never became law and the power was never exercised before 1865. The Senate of 1800, frustrated in its aim to control the count through the grand committee, was probably for that reason impelled to amend the House substitute bill so as to vest either House alone with power to reject the vote of a State. Some of the ablest senators of the day denounced the bill as unconstitutional. In the House, in support of the necessity of concurrent action to reject a State vote, were men like Marshall, Bayard, and Harper.

The action of Congress in 1865 is the first instance of the rejection of the votes of a State by Congress, for it will be recalled that the count was in the alternative in 1821, 1837, and 1857. This rejection was not due to general legislation as to disputed or doubtful returns, but was based upon the joint resolution, which was special legislation.

When the electoral count was made in 1869 the scenes of tumult and disorder eclipsed even the violent occurrences of 1857. A stormy debate followed in the House,

lasting three days after the count was completed. The origin of the trouble was the *status* of certain lately reconstructed States, especially Georgia. Congress in the preceding session had passed a resolution defining the circumstances under which the lately rebellious States might vote at the coming presidential election. No electoral vote from any of these States was to be counted unless at the time prescribed by law for the choice of electors, there was a government organized and in operation in the State under a constitution adopted after March 4, 1867, and unless the election had been held under the authority of that constitution and government, and unless the State had become entitled to representation in Congress pursuant to acts of that body. This resolution was vetoed by President Johnson, but was passed over his veto by two thirds of both Houses. Virginia, Mississippi, and Texas were not allowed to participate in the election. Georgia at the time of the count had her representatives in the House, but the question whether she had fully complied with the reconstruction acts of Congress was still before the Senate. To avoid the count of Georgia's electoral vote, and the possible inference that she was entitled to all the prerogatives of a State, Edmunds offered in the Senate, on February 6, 1869, a resolution which provided for an alternative count of her vote after the manner established by the Missouri precedent of 1821.

The resolution was criticised by Trumbull and opposed by Hendricks, of Indiana, and Whyte,<sup>1</sup> of Maryland, but agreed to, and was promptly approved in the House. As was afterwards said by General Butler, of Massachusetts, it was passed in the Senate "with very little debate," and "put through this house at night without a single word of debate, under a suspension of the rules," with nearly one half of the House absent. The joint session

<sup>1</sup> Grandson of the eminent and eloquent William Pinkney, of Maryland.

occurred on February 10, 1869. The first objection related to the count of the votes certified from Louisiana, and was that no valid election of electors had been held in that State. The Senate retired to its chamber and, after considerable discussion, although debate was not in order, decided by a vote of 51 to 7 that the votes of that State should be counted. The House, by a vote of 137 to 63, reached the same conclusion; the joint session was resumed and the vote of Louisiana was accepted. Georgia, for some reason, had been placed at the end of the list of States, although the custom had been to call the roll alphabetically. Butler, of Massachusetts, objected under the twenty-second joint rule to the count of its votes, on four grounds: first, that the vote of the electors in the electoral college was not given on the first Wednesday of December as then required by law; secondly, that at the date of the election the State had not been readmitted to representation as a State in Congress or become entitled thereto; thirdly, that she had not at that date complied with the reconstruction acts of Congress; and, fourthly, that the pretended election held in that State in the preceding November was not a free, just, equal, and fair election. Butler's objections at once raised the question whether the count was to be had under the resolution or the twenty-second joint rule. Edmunds, in answer to Butler's objections, urged that the two Houses were proceeding under a special joint resolution and not under the joint rule, and that under that resolution no objection to Georgia was to be considered, but that the count was to be taken in the alternative. Butler replied that the votes must either be counted or rejected, and that the concurrent resolution could not bind the joint convention. The president of the Senate, Wade, of Ohio, ruled to uphold the concurrent resolution, the purport of which was that if the votes of Georgia should not change the result, they might be

counted, but that if they did alter the result, they should not be counted. A burst of laughter greeted this decision. Butler then proposed to appeal from the decision to the House of Representatives, but was informed by the chair that such an appeal was impossible. One other member of the House objecting, the presiding officer directed the Senate to retire. Although debate was not permissible, much talk followed in the Senate, which at last resulted in a vote of that body, of 32 to 27, that under the joint resolution the objections to counting the electoral vote of Georgia were not in order. Wade, the presiding officer, several times asked how the decision of the Senate was to be announced upon the reassembling of the two Houses, but received no light. Edmunds said the chair ought to announce the decision of the Senate and then "proceed under the joint rule" [resolution]. Sherman declared the question most grave, "because if the rule now laid down is to be observed, no President of the United States could ever be elected with the Senate one way and the House the other." In the meanwhile, the vote in the House was upon an entirely different proposition, which was "shall the vote of Georgia be counted, notwithstanding the objections of the gentleman from Massachusetts?" The House promptly resolved to reject the vote, by 150 yeas to 31 nays. When the joint session was resumed, the president of the Senate declared that the objections of the gentleman from Massachusetts had been overruled by the Senate, and that the result of the vote would be stated as it would stand were the vote of Georgia counted, and as it would stand were the vote of that State not counted. Butler appealed to the joint convention, but the presiding officer declined to entertain his appeal. Butler insisted that arbitrary proceedings could not "override the privileges of this House," but he and all other representatives who insisted the appeal should be heard were



ruled out of order in the midst of a great uproar, in which Butler rudely demanded that the Senate should retire. "We certainly have the right to clear the hall of interlopers." The count was completed and the result declared in the alternative, as in 1821 and 1857. When the House resumed its session, Butler moved a resolution of protest that "the counting of the vote of Georgia by order of the president *pro tem*, was a gross act of oppression and an invasion of the rights and privileges of the House." After an animated and tumultuous debate of three days his motion was defeated.

The acrimonious discussion that arose in the House over Butler's resolution exhibited the same discordant views that had appeared in every preceding debate in Congress. Butler was violent and denunciatory, but sound in his criticism of the joint resolution as an evasion of the constitutional duty to count. It had not, he declared, "any more force and effect than the blank paper it was written on." The Speaker, Colfax, defended Wade's action. Shellabarger, of Ohio, in an exhaustive argument, contended that the president of the Senate was not only to open but also to count the votes, and that no concurrent or joint resolution, or even act of Congress, could permit the Senate and the House to separate, and, by themselves, adopt any form of order or decision which should render it impossible for the joint convention, when reassembled, to count any one of the States. He admitted that his argument gave great power to the president of the Senate, "but," said he, "there are difficulties whichever way we turn." The danger of giving the power to reject the votes to either House or both Houses was

"even greater than in giving it to the president of the Senate, because by rejecting the votes, the Senate and House can throw by their own act the election of the President into the House, and of the Vice-President into the Senate. . . .

Indeed, the gentleman from Massachusetts, who proposes this most severe and extraordinary censure has exclaimed himself, more than I can exclaim, against the frightful consequences which would come from permitting one or either House of Congress to get by itself, and there, in separate session, by the *per capita* vote of its members, without debate, vote out the decision of the people of any and every State in selecting the Chief Magistrate of the republic."

Shellabarger dwelt with emphasis and iteration upon the pernicious nature of the twenty-second joint rule, declaring that if its true interpretation was that no vote should be counted until both Houses, by separate vote, should concur in accepting the vote, it was plainly void as in conflict with the Constitution, "which requires, in so many words, that every act that enters into and makes a counting of the votes shall be in the presence of the two Houses." But he was not so successful in maintaining the constitutionality of the concurrent resolution or in vindicating Wade's action, for an alternative count is in reality no count at all, but an evasion. Eldridge, of Wisconsin, was on truer ground in criticising both the concurrent resolution and the twenty-second joint rule as violating the Constitution.

This disgraceful controversy over the solemn act of ascertaining who had been elected President clearly reveals one of two things: Either the Constitution had proven faulty or Congress had for years shirked its duty in failing to pass any general law to regulate the count. Garfield reminded the House that in March, 1868, he had moved that the Judiciary Committee should be empowered to inquire into the expediency of providing by law for the settlement of a contested election for President and Vice-President, but that no report had been made by the committee. Congress remained deaf to the voice that spoke of danger, yet the country kept drifting towards the maelstrom.

The counting of the electoral vote in February, 1873, was not attended by such dramatic incidents as marked the count of 1869, yet the treatment of at least one State was grossly unjust. Louisiana sent two sets of returns to Washington, one, sustained by the certificate of Governor Warmoth, based upon a partial canvass of a returning board appointed by him under a statute of the State passed in 1872; the other, predicated upon evidence as to the election submitted to a rival canvassing body known as the Lynch board. From the report of a special committee of inquiry raised in the Senate of the United States, it would seem that the Louisiana statute had not been complied with by the governor, and also that the Lynch board had not been permitted to inspect the returns. In the opinion of a majority of the Senate committee, the Greeley electors had received a majority of the votes at the November election. Subsequent to the meeting of the electors in December, the Supreme Court of Louisiana decided that the Lynch board was the legal returning board, but, as will be hereafter seen in the discussion of the Florida case before the Electoral Commission of 1877, the majority of that commission held that a *post hac* judgment could not invalidate the title of electors who had previously cast their ballots. Senator Morton, who was of this opinion in 1877, nevertheless stated in an addendum made by him to the report of the Senate committee of 1873, of which he was a member, that "decisions of courts of last resort are made at the end of causes, and not at the beginning, and are held to relate back and establish the rights of parties throughout the whole controversy." In the joint session of the two Houses held on February 12, 1873, the twenty-second joint rule was again enforced. The House, upon objection to the electoral vote of Arkansas, which was attested by the Secretary of State only and authenticated by his official seal, voted to count it, while the Senate voted

to reject it, and under the twenty-second joint rule it was not counted. Objection was made by Potter, of New York, to one vote of Mississippi cast by an elector chosen to fill a vacancy, which was certified only by the Secretary of State. Senator Trumbull, of Illinois, also objected to the vote of Mississippi on the ground that the certificates failed to state that the electors voted by ballot, but the two Houses agreed to accept all the votes of the State. In the case of Louisiana both Houses were also in accord,—that none of the returns reported by the tellers as the electoral votes of that State should be counted. This resolution was carried in the Senate by 33 yeas to 16 nays, and was also carried in the House.<sup>1</sup> The authenticity of the seal attached to the certificate from Texas, which was made by the Secretary of State and not the governor, was challenged, but both the Senate and the House agreed to accept the votes of that State. A novel question arose over the Georgia returns. Hoar, of the House, objected that

“the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot lawfully be counted because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes, and was not a ‘person’ within the meaning of the Constitution, this being an historic fact of which the two Houses may properly take notice.”

Upon the separation of the two Houses to pass upon this objection, the House, by a vote of 101 to 99, resolved that the vote “ought not to be counted, the said Horace Greeley having died before the votes were cast.” The Senate, on the contrary, decided that the votes should be counted, but was perturbed about the form in which

<sup>1</sup>Vote in House is not given in the record.

its resolution should be phrased. The motion offered was that "the electoral votes of Georgia cast for Horace Greeley be counted." To this Senator Conkling wished to add, "the function of the two houses being ministerial merely and this question being independent of the question of the effect of the votes or of the count." This amendment, which was defeated, was unsuccessfully renewed in other forms, and the Senate finally agreed to count Georgia's vote, 44 yeas to 19 nays. As three of Georgia's electors had voted for Greeley, the votes of three of the electors of that State were excluded under the joint rule. The two Houses of Congress differing as to Louisiana, the votes of that State were rejected.

The Arkansas case illustrates the gross injustice which the twenty-second joint rule, with its denial of debate, rendered possible. The point of the objection to the vote of that State was that the returns read by the tellers were not certified according to law. The House voted to count, but the Senate to reject, and the State was accordingly disfranchised under the joint rule. In the debate in March, 1876, upon the Morton bill to count the electoral vote, Senator Sherman acknowledged that the Arkansas decision was unjust.

"Each senator went up to the desk and examined the paper, and without having time to look at the law, without having even time to send to the library to see what the constitution of Arkansas required, we fell into the error of supposing a fact which did not exist, that the State of Arkansas had a seal, and therefore we rejected the vote of that State because of the want of a State seal to the certificate."

Morton's confession of error was even blunter; he pronounced the Senate decision "a foolish blunder," which had the astonishing result "that in twenty minutes we disfranchised about six hundred thousand people." The *Federalist* would assuredly never have declared the elec-

toral system perfect if its author could have conceived such an outcome as constitutionally possible.

A few weeks before the electoral count of 1873, Senator Morton, who had for years been giving serious thought to the difficulties arising in connection with the count, moved in the Senate the following resolution :

*“Resolved, That the Committee on Privileges and Elections be instructed to examine and report, at the next session of Congress, upon the best and most practicable mode of electing the President and Vice-President, and providing a tribunal to adjust and decide all contested questions connected therewith, with leave to sit during vacation.”*

Senator Morton’s speech upon the resolution is an admirable exposition of the meaning and purpose of the electoral system and an irrefragable argument against the “twenty-second joint rule.” It well shows how the electoral machinery has been perverted from the original design, and exposes its fallacies, absurdities, and injustices.

Of the twenty-second joint rule, Morton asserted that it was adopted without much consideration and with a view apparently of furnishing an additional safeguard against the acceptance of electoral votes from States that had recently been in rebellion. “It is, in my judgment,” he said, “the most dangerous contrivance to the peace of the nation that has ever been invented by Congress.”

Morton’s speech further portrayed the evil effects of the joint rule :

“Here is a powerful temptation to the House of Representatives, by non-concurrence, to throw the election into its own body, and thus, perhaps, secure the election of a candidate who may have been overwhelmingly beaten at the polls. . . . The rule is an invitation to partisans to make captious and factious objections. It makes the concurrent action of the

two Houses necessary where it should not be; and to sum up its perilous absurdity, its 'monstrous illogic,' its dangerous unconstitutionality, it places it in the power of a defeated party, which may happen to have a majority in either House, to defeat an election by the people and to take the chances of anarchy or of victory by throwing the election into the House of Representatives."

The Constitution, he argued, in providing that "each House may determine the rules of its own proceedings," did not confer the power upon the two Houses by a joint rule to enable either House to disfranchise States by rejecting their electoral votes.

"The provisions of this [the twenty-second joint] rule, to have any validity, must be embraced in a law duly enacted, which has been submitted to the President for his approval; and, even as a law, it would be the most fearful enactment on the statute-book, conferring as it does upon either House the power to block the wheels of government and plunge the nation into anarchy. It was the purpose of the framers of the Constitution to make the executive and legislative branches so far independent of each other that the existence of the one would not depend upon the consent or action of the other; but here is a rule, a mere parliamentary rule, which gives to either House a fatal negative upon the election of a President by the people. A power so vast and dangerous certainly cannot be created as a mere rule of proceeding."

Senator Morton favored an election of President and Vice-President directly by the people in congressional districts. His immediate object, he declared, was

"not so much to advise and propose remedies, as to point out to the Senate and to the country dangers that lie in the pathway of the nation, contingencies, *some of them not remote, but near and probable*, which threaten the country with revolution and the government with destruction, and to urge that . . .

now, in a time of peace and political calm throughout the nation, we should address ourselves to the removal of these perilous obstructions that were hidden to the eyes of our fathers, but have been brought to our knowledge by observation and experience."

The committee should bring forward such measures as might be deemed necessary, whether in the form of statutes or amendments to the Constitution. The resolution was adopted. On January 26, 1875, Morton introduced in the Senate a bill "to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon." It differed from the twenty-second joint rule in providing that no electoral vote or votes from any State should be rejected except by the affirmative vote of the two Houses, whereas the twenty-second joint rule prescribed that a vote should not be counted if either House objected. In case of more than one return from a State, the bill provided that that return, and that only, should be counted which the two Houses, sitting separately, should decide to be the true and valid return. A long debate ensued in which every feature of the bill was carefully discussed. Edmunds sought to amend it so as to provide, by way of analogy to the bill of 1800, that all the papers opened in the presence of the two Houses should be referred to a sworn committee of four Senators and four Representatives, who should report to the two Houses, and that their report should be accepted unless both Houses agreed upon rejection,—a measure, in this last feature, similar to the Electoral Commission bill of 1877. This amendment was not accepted, and the bill, after some verbal alterations, was passed by the Senate by a vote of 28 to 20. The lengthy debate revealed many sharp conflicts of opinion. Edmunds held that the election of a President might be made the subject of a contest in the courts of the United States, but Thurman



took issue with him. The Federal courts had no jurisdiction to try a case involving the title to the presidency. If such a suit was affirmed upon appeal by the highest tribunal and its decision should direct the President *de facto* to be ousted from office, how was the judgment to be enforced? The Supreme Court would be powerless to execute its judgment; "it has no army, it has no treasury." How can a judgment of ouster be enforced against the man who is *de facto* President of the United States? The fathers plainly never intended that the office of chief magistrate should be contested in any court; on the contrary, whatever the error in deciding the election, the Constitution meant that the title of the person declared to be President in the joint assembly of the two Houses should never be in doubt for a moment after he had been declared elected in pursuance of its provisions. Merrimon, of North Carolina, Hamilton, of Maryland, Saulsbury, of Delaware, like Gallatin, Macon, John Nicholas, and John Randolph in 1800, denied the right of the two Houses to separate during a joint session, and insisted that every step of the count must be in the physical presence of both Houses sitting as one body. It was known that the succeeding House of Representatives would be under Democratic control. Bayard, Eaton, and others counselled delay, that the measure might have the benefit of non-partisan discussion. Some argued that it deprived the president of the Senate of his constitutional power to count, and others condemned it as at variance with the organic law in other particulars. All the affirmative votes were Republican, but Carpenter, Conkling, Edmunds, and Windom voted with the Democrats against it.

The bill, which was not acted upon by the House, was revived in the Senate in the following winter and was fully and exhaustively discussed during March, 1876.

The first section provided substantially as follows: The

two Houses of Congress shall assemble in the hall of the House of Representatives, at the hour of one o'clock, on the last Wednesday in January next succeeding the meeting of the electors of President and Vice-President of the United States, and the president of the Senate shall be their presiding officer; one teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the president of the Senate, the certificates of the electoral votes; and the tellers, having read the same in the presence and hearing of the two Houses then assembled, shall make a list of the votes as they shall appear from the certificates; and the votes having been counted, the result of the same shall be delivered to the president of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two Houses. If, upon the reading of any certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and the question shall be submitted to the body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit the question to the House of Representatives for its decision; and no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two Houses. When the two Houses shall have voted, they shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted. And any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner.

The language of the second section was in effect: If more than one return shall be received by the president of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two Houses when assembled to count the votes; and that return from such State shall be counted which the two Houses, acting separately, shall decide to be the true and valid return.

By the third section it was provided: When the two Houses separate to decide upon an objection made to the counting of any electoral vote or votes from any State, or for the decision of any other question pertinent thereto, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once; but after such debate has lasted two hours, it shall be in the power of a majority of each House to direct that the main question shall be put without further debate.

Section 4 declared: At such joint meeting of the two Houses seats shall be provided as follows: For the president of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, secretary of the Senate, and clerk of the House of Representatives, at the clerk's desk; for the other officers of the two Houses, in front of the clerk's desk and upon each side of the Speaker's platform. The joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct

a recess not beyond the next day, at the hour of ten o'clock in the forenoon.

The earlier discussions of the bill related to its separate provisions, and particularly to its mode of dealing with two or more returns, but the debate afterwards took a wider range and involved the fundamental inquiry as to the meaning of the Constitution and where it had intended to repose the counting power. The twenty-second joint rule had few, if any, defenders. The rule was rescinded by the Senate on January 20, 1876. Bayard considered that the concurrence of the House was not essential. He denounced the rule, "that gave the power of absolute veto to either House . . . in separate session and without an opportunity of debate" as "utter usurpation, utterly without warrant in the Constitution, dangerous in the extreme"; and in sufficiently plain terms he reminded the Senate that the rule had not been rescinded because of its "monstrosity," for, until there was a change in the majority of the popular branch of Congress, "this rule, with all its unhallowed and dangerous and despotic power, stood unquestioned and unassailed." Whyte called it "an enormity," and said the Senate was wise in "annihilating" it.

The necessity for a general law was obvious to many besides the framer of the bill.

"Soon after the count of the votes at the last presidential election," said Thurman, "I took occasion to say in the Senate that, in my judgment, unless something were devised to obviate the danger to the country that might grow out of the count of the vote for President, we might find the country plunged into civil war upon the question who has been elected President of the United States. That count was calculated to make every one reflect, to make every one feel how dangerous is our situation. We saw more than one State deprived of its electoral vote on that count, where the two Houses were divided in opinion; we saw States lose their vote entirely;

and fortunate it was for the country that the rejection of those States did not change the result."

The clause of the bill eliciting the most earnest discussion, reflecting singular differences of opinion, related to double returns. The defect—that the two Houses might never agree—did not escape the astuteness of several Senators, yet no ingenuity was able to devise a satisfactory provision; for the reason, doubtless, that the theory of a congressional count by two Houses (a theory at variance, I think, with the Constitution) is subject to mathematical laws which inexorably forbid a solution by two co-ordinate bodies. Suppose the two Houses disagree, is the vote of the State then to be sacrificed? was asked by many Senators. "It is a grave question," said Bayard, "whether the two Houses have the power to constitute themselves a tribunal for the acceptance or rejection of the vote of a State at will"; and he doubted "whether the two Houses of Congress were ever intended to become the judges of the electoral vote of the people of this country." Withers pertinently said that if the inability of the two Houses to agree upon the correct return was to result in the rejection of the vote of a State, it was left in the power of either House to veto the vote of such a State, and Eaton asked Morton to avert this possible wrong to a State and "find some tribunal which will determine the matter." Thurman also hoped that some such tribunal might be devised, although he confessed his own inability to suggest any. He did, however, utter some wholesome truths. In order to aid in the solution of the problem, it should be remembered, he said, that "it is not Congress, in its legislative capacity, . . . Congress, as a law-making power, that counts the votes. . . . Congress can provide by law the mode of counting the votes. The only question is what limitations are there on our power

to provide that mode." So sceptical was he of the ability of the Senate to provide some ultimate tribunal between the two Houses, that he feared it would finally decide to give the decision of one of the two a predominance over the other.

Various remedies were proposed, but to each some valid objection was advanced. Cooper, of Tennessee, offered an amendment providing that if the two Houses should not be in accord, that return should be counted which the House of Representatives, voting by States, in the manner prescribed by the Constitution when the election devolves upon it, should decide to be the true and valid return. Kernan, of New York, thought the amendment would partially annul the will of the people, because a State having only one representative would exercise a power "equivalent to the vote of four millions of people in another State," and Morton conclusively refuted Cooper's idea that his plan could be representative of the people when it proposed to leave the decision to a House elected two years previously; and he used the occasion to quote remarks from his former speeches, to the effect that the constitutional requirement for an election in the House, where no candidate had a majority of the electoral vote, was the weakest and most vicious feature of the electoral system. Johnston, of Virginia, in presenting an amendment to Cooper's amendment, argued that a vote should instead be had by States in a joint meeting of the two Houses, the representation from each State, including its Senators, to have one vote; but all these amendments were voted down.

Senator Frelinghuysen, of New Jersey, held it would be a great calamity to the country to have the will of the people defeated in the election of President by the failure to count the vote of a State. It was a duty, he said, to enact such a law that the vote of every State should certainly be counted. Some action was imperative, but

“the best that can be said for any plan is, that it is not in violation of any provision of the Constitution.” Frelinghuysen would have referred the difference between the two Houses, in case of more than one return, to the Chief Justice of the Supreme Court, the presiding officer of the Senate, and the Speaker of the House, whose decision should be final. The utmost he could advance for his own plan was that it “was not contrary to the Constitution.” The fathers, he said, had not progressed so far in political ethics as had the men of his own day. The former did not anticipate two governors in a State. It had been urged by Thurman that the famous passage in Kent’s commentaries, “I presume, in the absence of all legislative provision on the subject, that the president of the Senate counts the votes and determines the result,” implied the power of Congress to regulate the entire matter; to which Whyte responded that the question was whether Kent, in this expression, meant legislation in regard to organic or statute law, adding that, in his opinion, Kent meant not a statutory, but a constitutional provision. But Johnston quickly retorted that Chancellor Kent certainly knew the difference between a legislative and a constitutional proceeding.

Christiancy, of Michigan, although impressed by the reasoning upon which the power of the two Houses to count was predicated, was “inclined to think the only safe mode to remedy the evil is by an amendment to the Constitution.” Stevenson, of Kentucky, also believed there was a *casus omissus*, which could be reached only by a change in the fundamental law. Whyte, in two elaborate speeches, forcibly argued that the president of the Senate was the proper person to count the votes, and that the duty was ministerial. He appealed to the precedent set at the formation of the Government by the Resolution of 1787, framed by the creators of the Constitution, which distinctly laid the duty of counting the

votes upon the president of the Senate, and with much earnestness declared that he would vote for no bill "which takes away the power of counting the vote, the power of opening the returns, from that officer, whom, in my judgment, our fathers designated as the proper depositary for such power."

Dawes, of Massachusetts, exclaimed against the bill as "a delusion." It was not a constitutional bill; what was necessary was an amendment to the Constitution, but as the bill was better than nothing he would vote for it. Maxey, of Texas, favored reposing the power to count in the president of the Senate when the two Houses could not agree. Jones, of Florida, considered the bill "a plain departure from the Constitution," differing little, if at all, from the much-condemned twenty-second joint rule. The discussion, as Withers said, had "drifted off into two great channels. . . . One is, upon whom the constitutional right devolves to count the votes of ordinary electors. The other is, . . . what course shall be taken where two returns come up from a State, each claiming to be the proper return of that State?" He pronounced Whyte's argument upon the first branch conclusive; and the same view of the duty of the president of the Senate was taken by Maxey and Stevenson, while Johnston expressed himself as diametrically opposed. All other amendments being out of the way, Maxey proposed an amendment giving the ultimate decision upon disputed returns to the president of the Senate, but it in turn was rejected. Merrimon thereupon proposed to amend the second section of the bill so as to provide, in case of a double return, that that return from the State should be counted which should "be duly authenticated by the State authorities recognized by and in harmony with the United States as provided by the Constitution," and supported it by an elaborate argument, traversing the views of Whyte and others,



who believed the president of the Senate should count the votes. But Morton conclusively exposed the weakness of this plan. It left undecided the question which of the two pretended governments was recognized by and which one was in harmony with the United States.

“There being two returns and two pretended governments, somebody must decide the question. We say the president of the Senate cannot decide it; the House cannot decide it alone; the Senate cannot decide it alone. Therefore, that government must be selected by both Houses; and the amendment of the Senator still leaves the main question open to be decided, which is the government acting in harmony with the United States? in other words, which is the lawful government of the State? I submit to my friend that that question can only be determined by both Houses, and where the two Houses disagree about that, the question is left open just as it was before.”

The amendment proposed by Merrimon was rejected, whereupon Randolph, of Michigan, to reconcile all differences, proposed that if the two Houses disagreed, the disputed returns should be referred to the Houses assembled in joint meeting, to be determined upon by a *per capita* vote, the president of the Senate to give the casting vote if the votes were equally divided. This amendment met prompt opposition, as being in conflict with the Constitution, and was defeated. The final amendment offered was by Bayard, that the House of Representatives should alone decide, if the Houses failed to agree, but this was rejected.

The terms of the bill were for weeks subjected to most careful scrutiny by able lawyers. The debate, as Bayard said, was a “strong proof of the want of direct provision in the Constitution in relation to this question of the count of the votes.” It is seldom that views so diverse have been expressed in relation to a matter that seems so

simple in itself. The bill was passed by the Senate on March 24, 1876, by a vote of 32 to 26, fifteen members being absent, Bayard and all of the Democrats, except Thurman, persisting in opposition. With them, against their own party, were Conkling and Edmunds. Morrill, of Vermont, and Boutwell were among those not voting.

If Congress possessed no authority to pass any law, the only remedy lay in a constitutional amendment, for no one would insist that any more power than the Constitution had given to the two Houses, when sitting under that clause of the Constitution, could be conferred upon them by legislation. Men of like political beliefs expressed profound differences of opinion, some arguing for the plenary authority of the president of the Senate to decide upon the certificates, and count the votes; others asserting that the two Houses sitting separately were ultimate arbiters; others again contending that the Constitution intended to give the two Houses when sitting together complete power to decide all doubtful questions; others again regarding any interference by either House or by the Houses in joint session, with the counting of the vote, as an unconstitutional usurpation of power.

Had the Morton bill been passed, the difficulties which arose in 1877, when double and even treble returns were presented from some of the Southern States, might have been readily solved, but the measure would probably have resulted in electing Mr. Tilden to the presidency. Conkling said in the Senate, in January, 1877, that the bill "would have deposited with the House of Representatives absolutely the decision of the late election." Tilden had 184 electoral votes, while 185 were essential to the election of Mr. Hayes. As more than one return came from Florida, South Carolina, Louisiana, and Oregon, and as the Senate and the House, from difference in political complexion, would not have been able to agree upon these returns, no certificates would have been

received from the three Southern States had the Morton bill become law, and one electoral vote from Oregon would have been counted for Tilden. Tilden would then either have had a majority of the electoral votes counted, or, if without a majority of the electors appointed, the election that would then have taken place in the House of Representatives would have unquestionably seated him in the presidency.

As in 1875, the motives of the advocates of the bill of 1876 were occasionally impugned. It was said that the inspiration of the bill was partisan and its object to forestall a free and impartial consideration of this grave matter by the next Congress, in which the House of Representatives would be under Democratic control.<sup>1</sup> The idea of political advantage may have actuated some Senators, yet the twenty-second joint rule was vehemently criticised both by Republicans and Democrats. Had the joint rule been in force in 1877, it would probably have elected Mr. Tilden, for the House alone could have rejected any or all the returns from Florida, South Carolina, or Louisiana, and have refused its acceptance of the Hayes votes from Oregon.

The practical operation of the bill of 1876, had it become law, would have been as follows: A single electoral return from a State, upon objection to its receipt by any member of either House while the two were in joint session, would have been submitted to the two Houses separately, but would have been sure in the end to be counted, unless both Houses concurred in throwing it out; whereas,

<sup>1</sup> Thus Thurman wished the decision of the matter remitted to the next Congress, "when one House will be of one political complexion and another of another, and when a measure may be matured that would be more likely to give universal satisfaction: for I take it to be almost certain that the twenty-second joint rule cannot stand as the law of Congress." "You might as well," said Edmunds, "institute a court composed of two judges, and hold that no evidence shall be received, as the present rule is, except the two judges concur to receive it."

in the case of more than one return from a State, the vote of the State was certain not to be counted, unless both Houses agreed that one of the multiple certificates represented the true and valid return of the State's vote. In this latter provision lay its weakness, and it is one of the radical defects in the Act of 1887. For the possibility of securing the rejection of the vote of a State might lead to the fabrication of dual returns. Thurman, who hesitatingly voted for the bill of 1876, thus stated the argument for this section: "Something must be done for a case where there are two conflicting returns; and what can you do but to require the two Houses to consider each of these returns, and then determine which of them shall be received? They can make no decision to receive one, unless both Houses concur." But the difficulty of the problem was hardly an argument for erecting the two Houses into a tribunal to solve it, unless the organic law expressly or impliedly conferred this power upon them, and here was the persistent query.

The vote was so nearly upon party lines that Thurman promptly moved its reconsideration. While he confessed his inability to see any partisan advantage in the bill, he was convinced that there was a "fatal omission" in it; it did not provide for an "ultimate decision" in case there were two or more returns from a State. He candidly said he could not recall a discussion in the Senate on any great public measure that had been freer from party considerations, and Morton expressed the same sentiment. The motion to reconsider was subsequently passed by a vote of 31 to 23, Conkling and Edmunds voting in the affirmative with the Democrats; consideration of the bill was resumed in August, but the proximity of the election was doubtless the reason why no further vote was reached.

The constitutional objections to the bill, often reiterated in the course of the debates, cannot but impress the

student with a sense of the great departure which it proposed from the intent of the founders of the Government, a departure that was accomplished by the Act of 1887. One striking fact is that, whether the debate be in the Senate chamber or the more popular House, whether it be in 1800, in 1821, over the Wisconsin vote in 1857, during the reconstruction era, or over the Morton bill, we listen to the old familiar arguments, and hear the same doubt raised as to the power of the president of the Senate or of the two Houses to count; and to every legislative panacea objection is convincingly urged that nothing short of a constitutional amendment will furnish an effective remedy.

## CHAPTER V

### DEBATE ON THE ELECTORAL COMMISSION BILL OF 1877

THE preceding review illustrates how sharp and irreconcilable were the differences of opinion whenever question arose upon the electoral count or the significance of the constitutional mandate "the votes shall then be counted." This brief clause seemed to be a riddle comparable with that propounded by the ancient sphinx to Edipus. Senator Sherman, in the debates of 1877, said that since 1801 there had been eleven cases of disputes over the electoral votes and that twenty-one objections had been made to the votes of different States. Yet, although there had often been angry and prolonged debate, Congress never ventured to frame a bill until 1875, and that bill, while twice approved by the Senate, failed of passage in the House. Seventy years previously

"Congress," said Senator Edmunds, during the debate of 1876-7, "had endeavored to pass a law, and after great deliberation the two Houses had separated upon a radical difference as to the treatment that a disputed certificate was to receive, one side by a great strength of votes and with a great show of reason contending that nothing ought to be admitted into this most vital function of the republic except what the House of Representatives and Senate should agree to admit. The other said, at the other end of the capitol, by a still greater number of votes and with an equal show of reason, . . . that no sister in this republic of States should have her voice excluded from the performance of this most interesting

and useful function, unless the two great powers of the State and people agree that she ought to be rejected."

The old divisions still persisted, for Pinckney, in 1800, in denying Congress the power to decide upon the vote of a State, hardly went to greater length than Morton in 1873, when the latter said that "the proposition that Congress has power to sit as a canvassing board upon the electoral votes of the States, admitting or rejecting them for reasons of its own, subverts the whole theory by which the appointment was conferred upon the States." With the Houses at variance, and with party members at war among themselves over the proper interpretation of the Constitution as to the powers of the president of the Senate, or of the two Houses of Congress, with conflicting opinions as to the necessity of remedial legislation, or the competency of Congress to deal with a subject upon which the Constitution was silent, or, as had been asserted by strict constructionists and loose constructionists alike, over which the States had plenary and exclusive jurisdiction, there was imminent danger, as had often been predicted, that a presidential election would occur when "alternative counting" would be impossible, and when a true count would become essential to the declaration of the true result. Constitutional amendments were from time to time introduced in Congress, but these usually looked to such a change in the organic law of the nation as would bring about an election of the chief executive by the people, in districts. General Jackson, in his inaugural messages, never forgetting his defeat in the House election of 1825, urged the passage of an amendment giving the election directly to the people. McDuffie in 1823, Benton in 1824 and again in 1844, and Gilmer in 1835, offered resolutions in Congress looking to a substantially similar change in the organic law. But Congress contented itself with enacting special legislation

adapted to a temporary condition when it passed the joint resolution of 1865. The joint rule of February 6, 1865, simultaneously and mysteriously called into being, and with only slight debate, was rigorously employed in that year and in 1873 to enforce the congressional policy of reconstruction, but this rule was repealed by the Senate on January 20, 1876, the House then being Democratic.

The presidential election of 1876 precipitated the long-feared crisis. The earliest returns in November indicated that Mr. Tilden had secured 184 electoral votes out of a total of 369.

The riots and disorder which accompanied the election in the State of Louisiana and the uncertainty as to the vote of that State and of the vote of South Carolina and of Florida are familiar history. Although Mr. Chandler, chairman of the Republican National Committee, claimed on the morning after election that Mr. Hayes had secured 185 electoral votes, including the votes of these three States, the country quickly realized the peril which would confront it when the count came to be made in the presence of both Houses, if there should be no agreement between the two bodies as to the mode of counting, and such an agreement, with the two Houses in antagonism, seemed at first impossible. It was asserted by one member of Congress in an address in the city of Washington that one hundred thousand persons would be present at the capital on February 14, 1877, to see that the votes were counted, and Morton in the Senate stated that assertions of a similar tenor were received by members of Congress from all parts of the country. Inasmuch as the Senate was Republican and the House Democratic, it was evident that neither House would be in accord with the other as to the method by which the proceedings should be regulated. The claim that the president of the Senate (Mr. Ferry), a Republican, had the constitu-



tional power to count was revived, while in the House this theory of the powers of the president of the Senate was repudiated, and resolutions were offered denying his possession of any such authority, asserting that the power was in both Houses concurrently and that the House would consent to no arrangement which would permit questionable returns to be counted without its approval.

In an article published by Senator Edmunds in the *American Law Review*, in October, 1877, the gravity of the danger that menaced the country is well depicted. It was, he said, morally certain that "the Senate would declare Hayes President, and the House Tilden." In that case, he continued,

"each of those gentlemen would have taken the oaths of office, and attempted to exercise its duties; each would have called upon the army and the people to sustain him against the usurpations of the other; and each would have found great numbers of supporters rallying to his standard in every State and district of the Union. The legislative branches of the government would, of necessity, have been placed in an attitude of direct and absolute antagonism, not only as to the rightful title to the office of President, but upon every subject of legislation; for there could be no legislation without an executive, and neither would recognize the President of the other. Mr. Tilden could make no appointment effectual, for the Senate would not recognize him; and neither he nor Mr. Hayes could get money to carry on the government, for neither House would grant it, save to the person it regarded as the true President. The solemn ceremonies and the grand pageant of inauguration would be only the first act in the awful tragedy of anarchy and civil war; lasting probably until the time for the next presidential election, and making such election practically impossible, unless, indeed, before that time some other system of government should have been established upon the ruins of our national structure."

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In the preceding Senate, in March, 1876, a joint resolution had been introduced proposing an amendment to Article XII. of the Constitution, prescribing that the Supreme Court should open the certificates and count the votes, and that no person holding the office of Justice of the Supreme Court should be eligible for President or Vice-President until the expiration of two years next after he should have ceased to be justice. But this resolution met the fate of all attempts to amend this article of the organic law made after 1804. Early, therefore, in the session which commenced in December, 1876, it was apparent that a deadlock would exist between the two Houses, with imminent danger to the peace and tranquillity of the nation, unless some temporary measure of pacification acceptable to the two opposing Houses should be devised. Fortunately the spirit of patriotism rose higher than party feeling. On December 14, 1876, the House of Representatives passed a resolution for the appointment of a committee of seven, with power to act, in conjunction with a similar committee to be appointed by the Senate, to prepare and report without delay a bill for the removal of the differences of opinion as to the proper mode of counting the electoral vote, and as to the mode of settlement of such questions as might arise relative to the legality and validity of the returns of the votes made by the several States, to the end that the votes should be counted and the result declared "by a tribunal whose authority none can question and whose decision all will accept as final." This resolution was approved without regard to party lines. On December 18th a like resolution passed the Senate, and was approved by President Grant, and accordingly each House appointed a committee of seven members. The Senate committee consisted of Edmunds, Morton, Frelinghuyssen, Conkling, Thurman, Bayard, and Matthew W. Ransom, of North Carolina. Henry B. Payne, of Ohio,

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Eppa Hunton, of Virginia, Abram S. Hewitt, of New York, William M. Springer, of Illinois, George W. McCrary, of Iowa, George F. Hoar, of Massachusetts, and George Willard, of Michigan, constituted the House committee. On January 18, 1877, the joint committee submitted a report to the respective Houses, in which all the members joined, with the single exception of Morton, recommending the passage of the bill that subsequently became the Electoral Commission law. In the Senate, Edmunds, as chairman of the committee, presented its report, together with the bill which the committee had framed, which was entitled: "An act to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March 4, 1877." As the title indicates, the bill proposed mere special legislation. Edmunds' address clearly sketched the main features of the bill. The bill, in brief, after providing for the meeting of the two Houses on January 31st, and the appointment of two tellers on behalf of the Senate (which had customarily appointed but one), and of two tellers from the House, prescribed that where but one return was received from a State the validity or regularity of which was questioned, that return should not be discarded except by the concurrent vote of the two Houses, thus reversing the principle of the twenty-second joint rule. It further provided that where more than one return was received, all questions in relation to the returns should, in the first instance, be referred to a commission consisting of fifteen persons, five to be members of the Senate, five, members of the House of Representatives (each House selecting its members of the commission), and five from the Supreme Court of the United States. Four of the Supreme Court justices were designated by the act—the justices assigned to the first, third, eighth, and ninth circuits—and the fifth justice was to be selected by

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his four judicial associates in such manner as the majority of the four should deem fit. The decision of a majority of the commission upon all such returns was then to be referred to each House and its decision was to stand as the determination of Congress, unless it was overruled by both Houses. The joint session was to commence its work two weeks earlier than usual, in order to give the tribunal time to pass upon any questions that might be submitted to it, before the date for the inauguration of a new President should arrive.

In the Senate of that day, and also in the House of Representatives, there were many able constitutional lawyers; and while it has been said, and perhaps justly, that the discussions of 1877 have added nothing to the elucidation of the perplexing problem, the gravity of the occasion, the vigor and eloquence of the opposing arguments, and the remarkable divergence of opinion, justify some brief allusion to the important features of the debate. At the outset of his speech, Edmunds announced that it was the aim of the joint committee to prepare a bill which would effect a decision that all men would declare to be right. "Opposing political opinions, opposing political convictions, warm wishes, partisan feelings have subsided on both sides," for the bill had the unanimous sanction of all members of the joint committee save one (Morton). Wherever but one set of returns was received from a State, the bill provided substantially, if not literally, what the Morton bill of 1876 contained upon this subject. He himself had not approved of that feature of the Morton bill, but he had acquiesced in its embodiment in the present measure. Respecting the appointment of a commission, he gave reasons why a selection of fifteen had been made instead of nine. The larger number was "so large as to produce every variety of intellectual capacity and learning and as to produce confidence against any possible attempt that might be made

—scarcely conceivable, to be sure—to unduly influence any one or two or three,” while it was at the same time not so unwieldy that it would not be “capable of prompt, effective consultation and deliberate and orderly procedure and decision.” That such a measure would not have been practicable without the antecedent discussion of almost a hundred years, Edmunds’ argument seems to imply. The bill, in fact, was a compilation from all previous experience. Had Congress, without the advantage it derived from the study and discussions of its predecessors, been suddenly called upon to frame a bill, upon a novel emergency, in the absence of all precedent, it could hardly have hoped within the brief time permitted to enact a measure which would have met the general acceptance of its members and of the country. The Supreme Court judges to be placed upon the commission were selected, said Edmunds, from various parts of the Union in order to represent the shades of opinion in all sections, and—this language is interesting in view of the result—

“to guard against prejudices in the minds of these ten millions of active voters, . . . not to guard against prejudice in the judges, not to guard against prejudice in senators, or members, . . . but to leave no faultfinder in the country a right to complain. We say that these four men shall choose a fifth from among their own associate members.”

An unfortunate feature of the measure, frequently exposed in the course of debate, was the provision which gave the four judges the choice of the fifth. Although the bill had been subjected to intense scrutiny in the few days succeeding its preparation, the chairman of the Senate committee had observed no criticism upon the absolute fairness and justice of the mode devised, apart from the doubt that had been expressed as to whether it harmonized with the Constitution. The bill placed each

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of the fifteen commissioners upon a solemn oath, and they would unquestionably "dismiss every consideration that would cloud their intellects or warp their judgments."

Edmunds dwelt upon the point that the bill clothed the commission with authority to determine how many and what persons had been duly appointed as electors in each State, inasmuch as the duty of electing the President, if no candidate should be found to have a majority of the electoral vote, would revert to the House. That the House might know whether the time had come for the exercise of its constitutional function of choosing the chief executive, it was essential, in the first instance, that the commission should report how many and what electors had been duly appointed. The critical question, upon which opinions in the committee had varied, was whether the measure should, in express terms, vest the commission with "the power to descend below the decision of a State authority." The consensus of the committee's opinion approved the bill in its existing form, for in that form it authorized the commission to consider all double returns, with the same powers, if any, as the two Houses possessed, acting either separately or together. The contest was to be decided in accordance with the law of the land as it stood at the time of the election, for it was neither the purpose nor the province of Congress to create a law after the election, which might elect an executive not chosen by the nation. That would be substituting the will of Congress, by arbitrary and unconstitutional retrospective legislation, for the will of the people.

A measure which would have expressly clothed the commission with power to go behind the returns, however extra-constitutional, would probably have been acclaimed with delight by the Democrats of the nation, but Edmunds skilfully argued, as a reason why no such power

had been conferred, that if the two Houses possessed such power, they possessed it under constitutional warrant; while, if they did not possess it, the bill should not give the commission such unconstitutional authority.

The next question related to the constitutionality of the plan. The framers of the Constitution had not reposed the power to count, nor intended to repose it, in the president of the Senate, hence the bill deprived that official of no constitutional function. Edmunds, in denying the power, said: "It staggers human credulity that the convention [of 1787] intended to turn the president of the Senate into a judge in the most critical of all cases for the well-being of the republic." The fathers had not said he possessed the power, and for forty years no paper coming from a State under its great seal, certified by its governor or certified by electors, had been drawn into question. He defended the law as constitutional under the residuary power vested in Congress. In the uncertainty in which the matter of counting was left by the Constitution, it was competent for Congress to create a tribunal impartially to consider these questions and report their decision to the two Houses.

The bill, as he stated, expressly provided that nothing in the act should be held to impair or affect any right under the Constitution and laws to determine, by proceedings in the judicial courts of the United States, the title of any person who should be declared elected or who should claim to be President or Vice-President of the United States, if such right exists.

Morton, the only member of the joint committee who opposed the enactment of the bill, characterized it as "a compromise, like the Compromise of 1820, and the Compromise of 1850." He affirmed his belief that Hayes had been elected under forms of law, and expressed his fear that the bill in some obscure manner clothed the commission with power to go behind the returns. The power to

count was either in the president of the Senate or in the two Houses, and if in the two Houses, it could not be delegated, nor was the vicious and unconstitutional nature of the proposed transaction cured by referring the matter from the commission back to the two Houses. He stigmatized the bill as "a contrivance, to use the mildest words, a contrivance, a patched-up thing; five representatives, five senators, four judges first, and they to choose a fifth, and thus this tribunal is to be created, that is to make a President of the United States. There are no analogies for it in our Constitution or in our laws or in our history." Even had the commission been restricted to members of the two Houses, it would have been unconstitutional, for the Houses of Congress could not appoint a committee to pass a law and make it binding unless it was reversed by both of them concurrently. The bill, he said, "gives an appeal from the commission to the Congress of the United States, provided that if the appeal shall be sustained by both Houses concurrently, the decision below shall be reversed."

Frelinghuysen said it was the paramount wish of the people that the national legislature, rising above party considerations, should at this critical period do exactly right. Alluding to the amendment he had proposed to the Morton bill in the session of 1876, to refer all disputed questions upon the electoral count to the president of the Senate, the Speaker of the House, and the Chief Justice of the United States to decide, he declared that the measure before the Senate was in accord with the principle of that amendment. "I can," he added, "conceive of nothing more at variance with the Constitution, than that Congress should go into an investigation whether each of the three hundred and sixty-nine presidential electors fairly received a higher vote than his competitor, or whether the three hundred and sixty-nine electors were all eligible." Congress could not be made



a grand returning board to investigate millions of votes, nor, for that matter, he might have added, could the commission have any such function. If no bill were passed, *quo warranto* proceedings to test the title to the presidential office might become necessary and the national executive might justly feel impelled to extreme measures to preserve public order. For these reasons his voice was for its passage.

Sherman declared the bill a novelty, but was reminded by Edmunds of its similarity, in many features, to the Senate bill of 1800, which went, said the latter, "much further than this bill." Sherman justly criticised it as special legislation, and, as such, of evil example, deserving careful scrutiny. The vice of the bill lay in the fact, not plainly printed on its face, that Congress intended the commission, so far as the members from the House and the Senate were concerned, to be composed of an equal number from each political party. There were to be three Republicans and two Democrats selected from the Senate and three Democrats and two Republicans, chosen in the House, to sit in the commission. The four justices selected by the bill were equally divided in their political views. The fifth judge, "the controlling member," is, he asked,—“to be selected how? In such manner as the majority of the four shall deem fit, . . . by ballot, . . . *viva voce*, . . . it may be by law, by chance, by any of the forms of chance known to gamblers.” For the selection of this controlling member, Congress had no better scheme than to employ “the element of blind chance,” and this fifteenth commissioner was to decide the presidential election. He arraigned the bill as unconstitutional, because the members of the commission were officers under the law and the Constitution, yet were not to be appointed in a constitutional manner. As the bill had been declared analogous to the bill of 1800, he reminded the Senate that that bill failed because

of a difference regarding amendments between the two Houses, for the question of having the chief justice one of the grand committee was eliminated from that measure by the Senate itself.

The speech delivered by Senator Conkling may be ranked as the most powerful, as it was the longest and most exhaustive, argument in favor of the bill. A partisan, a stalwart Republican, he had been expected to array himself upon the side of those who would assert the plenary power of the president of the Senate to count. The claim of the president of the Senate to count was, said Jeremiah S. Black, "the great rallying point until Mr. Conkling took it up, and in a speech of surpassing ability utterly demolished and reduced it to invisible atoms."<sup>1</sup> Much of this sort of applause greeted the speech from Democratic sources. The late Senator Hoar, who admits in his autobiography that he had formed an exceedingly unfavorable opinion of Conkling, eulogized him for his patriotic stand in the crisis of 1877. "He was on the side of the country in her hour of peril." Conkling was twitted in the debates for unnecessary prolixity in contending that the president of the Senate had not the power to count, for it was said that not more than four senators considered that official clothed with any such function. His address of eight hours was characterized by Morton as a "two-story speech." Conkling spoke with apparently sincere conviction, and after study of every utterance in regard to the subject "to be found in the books." He probably felt it incumbent upon him to leave no vestige of the claim for the powers of the president of the Senate, if he were to vindicate his attitude to the partisan element of the Republican party. In the judgment of many, both Democrats and Republicans, he achieved his aim, yet his argument, while cogent, is not irresistible. Conceding

<sup>1</sup> *Electoral Conspiracy*, 125 *N. A. R.*, 1, 23.

that a power which Congress has claimed to exercise is a rightful power and not a usurpation, it then follows that precedents may be drawn from the course of Congress to refute the power of the president of the Senate and establish that of the two Houses; but if the tendency of Congress had been to usurp a power never granted to it by the Constitution, no usurpation, however long continued, would supply the original lack of constitutional authority. There is much in Conkling's argument that deserves consideration. He reviewed the history of the clause which closes with the inscrutable words, "the votes shall then be counted," showing what changes and transpositions were made in the phraseology, which, neither in its original form nor in any revision, gave the president of the Senate authority to count. His argument was that the framers of the Constitution were masters of style, that every word was used advisedly, and that the omission of the Constitution to declare in unqualified terms that the votes should be counted by the president of the Senate clearly evinced that the power was not given to him. In stately and eloquent phrase he said:

"The men who drafted this solemn instrument, masters of language as most of them were, were so fastidious in taste, so scrupulous in the execution of their work, so determined that words should become exact vehicles of thought, that they appointed a committee on style, in order that every syllable might do its needed office."

Yet he overlooked the counter-argument, for the ambiguity operates both ways; his balanced periods might have been employed against the contention that the two Houses were to count. Morton in reply trenchantly asked: "If it had been the intention of the Constitution to give the two Houses the right to count the vote, would it not have said so?" With much plausibility Conkling urged that the person who was to open the certificates

was not to count; that, as the Houses were to be witnesses, they should be participants; that the president of the Senate might take up a paper and peruse it as he would a letter, the Senate seeing him from the body of the hall, but nevertheless no better able to see or know the signatures or seals or words or figures on the paper "than if they gazed at the spectacle from the galleries, or saw it as a concourse sees the oath of office administered to the President on the eastern portico of the capitol." If the president of the Senate counted and announced that no one had a majority, the House would be forced either to accept his statement, however incredible or against its own belief, and proceed to an election, or disregard his statement and refuse to proceed. He dissented from Morton's somewhat hasty assertion that all votes are to be counted, "good, bad, and indifferent." The president of the Senate had no power to send for persons and papers, to compel the surrender of telegrams or imprison witnesses; hence it could not have been intended that he should count. But this argument assigns to the word "count," the meaning of "canvass," which was not in the minds of the framers of the Constitution. He cited analogies, somewhat fanciful, for the powers of Congress from the control which the lords and commons under the British constitution exercised over the election and qualifications of officials, and drew similar arguments from the powers of the early State Legislatures. He enlarged with emphasis on the much-quoted expression of Chancellor Kent: "In the absence of legislative provision on the subject, I presume that the president of the Senate is to count," and showed that the Chancellor's expression, which was merely "I presume," being predicated upon the power of Congress to legislate, conceded its right to make an affirmative enactment. But the nature of the law which the Constitution authorizes Congress to make was the very question at issue.

Conkling waved aside the resolution adopted by the convention of 1787 (which provided that the president of the Senate should count the votes at the first election), as "a prefatory or provisional proceeding. The resolution did not profess to declare or construe any clause in the Constitution." Beginning in 1793, he said, until 1869,

"as often as electoral votes were to be counted, committees were raised by each House in advance, to ascertain and report the mode in which the votes should be examined. The committees reported how the proceedings should be conducted, the report was adopted by each House, and one thing always provided for was the appointment of tellers by each House. The right of the Houses thus asserted was never questioned. No president of the Senate, no member of either House ever interposed a challenge. When the day to open the certificates arrived, the two Houses directed the proceedings throughout. The tellers counted. Every question which arose was referred to the Houses. The Houses framed the certificate; they directed it to be signed. He who signed it was the organ and representative of the two Houses."

But the certificate in the earlier period was always signed by the president of the Senate and, as already noted, if Congress had entered upon a usurpation of power, no argument drawn from continued usurpation established the original authority.

His historical review was elaborate. He quoted Jefferson as in accord with the Nicholas amendment in the Senate to the bill of 1800, that "the inference from the course of proceedings in Congress was that the power to count resided in both Houses." Committees of both Houses were continued until the twenty-second joint rule was adopted, and when that rule was repealed the custom was revived. It is interesting to note his repugnance to the joint rule, which he admitted he had advocated in

1865. "Mr. Stevens reported it in the House, and demanded the previous question upon it, to which nobody objected; I state this to show that no debate took place and, according to my recollection, no Republican, not one, recorded himself against it. I believe no Republican Senator voted against it." In the same context, he acknowledged that it had been wisely repealed.

In support of the power of Congress, Conkling cited the Van Buren bill of April, 1824, which was to the effect that if the two Houses should have concurred in rejecting the vote or votes objected to, such vote or votes should not be counted; but that, unless both Houses should concur, such vote or votes should be counted. He thus closed his allusion to the Van Buren bill: "Be it wise or unwise, it asserts again, by a unity of voices, with no recorded doubt, that the paramount law had reposed in the two Houses the duty" to count and see that the true result was constitutionally ascertained. Reviewing the proceedings in 1817, 1821, 1837, and 1857, he said that Senator Douglas, John J. Crittenden, of Kentucky, and others, in the latter year, protested in the joint session, over which Senator Mason was the presiding officer, "against any curb or bit upon proceedings here," and that the president of the Senate, who was commonly asserted to have controlled the count, disclaimed all intention to influence the proceedings. He patriotically said that he was not surrendering the rights of the Republican party, and that he wished Hayes to have a title so clear that it could never be challenged. The bill was not a compromise; it was to establish the fact of his election. "To ascertain and establish the fact is not a compromise." Nor did the bill involve a surrender of any rights. The Morton bill of the preceding winter would have given the House of Representatives absolute power to decide the election; yet this bill was "branded as a surrender, by those who lately insisted that one House and one House

alone, in unbridled caprice, and with no statement of reasons required, might exclude a State by merely saying the vote shall not be counted." To the objection that Congress was making an unwarrantable delegation of power, he replied that the two Houses, consisting of four hundred members, could not each handle, scrutinize, examine, and tabulate all the contents, true and false, of the electoral certificates, and that it might properly depute this work to a committee, which was what our fathers proposed in 1800, and which they then called a grand committee. But here again the idea of a canvass of votes by Congress vitiates Conkling's argument. The committee or commission were to report back to the Houses, and were, in effect, to do what a referee or master in chancery would do for a court which reserved for itself final determination over the subject. "The two Houses retain the whole thing to the end absolutely in their own hands." Precisely the opposite of this is what the bill effected. Conkling seems to have entertained the view that the commission might go behind the returns and inquire into the popular election for electors, for he quoted from a speech he had made in the Senate in 1873, in which he said:

"I see no reason to doubt that any State having provided a popular election as the mode of appointing electors, and it being alleged that no such election has been held, or that the election was a mere mockery or mob, violative not only of the laws [of Louisiana] but . . . of the supreme law of the United States, we are within the scope of our power in sending a committee to find whether the allegation be fiction or fact."

Justice to this speech cannot be done by citations; it may be ranked as one of the ablest of Conkling's addresses in Congress. It had the effect of convincing many Republicans in either House and throughout the country

that the president of the Senate did not possess the power to count the vote; that Conkling was not relinquishing any ground upon which the party could safely stand, and that the measure of pacification, the enactment of which he advocated, was necessary to solve a debatable election. Nor was concession made by Republican Senators alone. Bayard, in supporting the bill, argued that if either House might reject the return from a State, which had been the practice under the joint rule, it was in the power of either to throw the election into the House of Representatives, which was under the control of the Democrats. He advocated the measure in the interest of a peaceful solution, believing the act to be not unconstitutional.

Thurman also supported the bill, which, he asserted, was not novel, which "does not go outside of the Constitution, unless the opinions of the most eminent men who have lived since the Government was formed are worthy of no regard." No single instance had occurred, he said, in which the president of the Senate ever decided a disputed question in respect to an electoral vote. In answer to those Democrats who wished a bill that explicitly defined the power of the two Houses, he declared that to frame a bill upon the idea of defining, by law, what the Constitution means, would be a simple impossibility. He adverted to the fact that Jefferson in 1800 entertained the view that the Houses act as one body while in a joint convention. He also appealed to Van Buren's bill of 1824, reminding the Senate that it had been approved in the House of Representatives, without the change of a letter, by so eminent a constitutional expounder as Daniel Webster, and ended by arguing that the bill was constitutional, inasmuch as it created a commission as a tribunal merely to investigate and report.

Morrill, who, nevertheless, voted for the bill, declared that fourteen fifteenths of the commission were to be



partisan, yet one fifteenth part was expected to be true and unbiased; "but for this," he said, "the bill would nowhere find support."

Morton, in replying to the supporters of the measure, disclaimed all fear that violence was to be apprehended if it should not become law; "the people would not stand for it." He called attention to the historical fact that the president of the Senate, in 1789, was authorized to open and count the vote by the resolution submitted with the Constitution to the people of the several States. John Langdon did so in 1789, and himself issued a certificate of election to General Washington over his own signature, in which he declared that at a certain day and in a certain place he had opened the certificates and counted the votes. Nine successive presidents of the Senate, from 1789 to 1825 inclusive, issued certificates of election to the President-elect, "in which they solemnly declared they had opened the certificates and counted all the votes." The practice then changed; certificates of election were no longer issued, but a joint committee of the two Houses notified the President of his election. Congress might have authority to go behind the certificate of a governor of a State, for Congress had by enactment provided for such certificates, but it could not go behind the certificate of the returning board. Here is foreshadowed the opinion which Morton subsequently held as a member of the commission. "The returning boards or canvassing officers are appointed by the laws of the States to determine the result of the election. That is the binding authority behind which the Congress of the United States cannot go." Morton had always consistently held this opinion, and he declared such to have been his view in 1873:

"I took the ground from first to last that Congress had no right to go behind the decision of the returning board in

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Louisiana. . . . That was my position then, as it is my position now. I believe it is a vital point in the constitutional doctrine of our country, and I believe that this very bill that I am opposing in vain to-night will violate, and I believe is intended to violate, that doctrine."

Edmunds had said that neither the president of the Senate nor the two Houses had the right to count a vote in the absence of legislation, but, said Morton, if this were so it would follow that for seventy-five years the votes were counted without authority of law; "I do not believe it." If the powers of the Electoral Commission were judicial, such powers could not be delegated to it under the Constitution. He truthfully asserted that if the bill had, in terms, deprived the commission of power to go behind the returning boards of the several States, no Democratic member of either House would vote for it. The Constitution declared that the count should take place in the presence of the two Houses; but what was done in the presence of the commission was not in the presence of the two Houses, and the commission was for that reason an unconstitutional body.

Blaine was unwilling to approve of the measure. He had favored the Edmunds resolution of a few weeks preceding for an amendment to the Constitution, to vest the power of deciding upon disputed returns in the Supreme Court of the United States; and he urged the Senate not to close its session without carefully maturing and submitting to the States a constitutional amendment which would remove as far as possible all embarrassment in the future.

Whyte supported the bill, although he would decline to vote for it if it were to be a permanent measure; in fact, a bill of this tenor would never have passed as a permanent measure. Whyte coincided with Clay and Barbour in the opinion that here was a *casus omissus* in

the Constitution. This modern difficulty had never been contemplated by its framers. He said, addressing the president of the Senate:

“ They meant that you, the highest officer next to the President of the United States, were to exercise the purely ministerial power of counting the vote, and left it to the House of Representatives, if you counted it falsely, and pronounced a man elected who had not a majority of the votes cast, immediately to proceed and exercise their jurisdiction in choosing a President over the man you had falsely counted in.”

He was undoubtedly right that the convention of 1787 intended to confer upon the president of the Senate a purely ministerial power; but assuming that the Electoral Commission bill had not been enacted, that Mr. Ferry as president of the Senate had undertaken to count the Hayes certificates from the doubtful States, and declared Mr. Hayes President of the United States, the House of Representatives, under Whyte's view, might have repudiated his action on the theory that he had falsely counted votes, and might have proceeded to exercise its authority and thereupon have chosen Mr. Tilden. No escape from the dilemma seemed possible without the enactment of this extra-constitutional measure.

The session of January 24th was an all-night session. Debate ceased about seven in the morning of January 25th, and the Senate adjourned to the 26th, when it passed the bill by a vote of 47 yeas and 17 nays, ten members being absent. But one Democratic Senator voted in opposition.

The debate in the House of Representatives was a confusing babel of tongues, but the dominant tone strongly favored the joint committee's bill. On January 25th McCrary, as a member of that committee, initiated the discussion with an argument that the power to count the electoral vote was lodged in the two Houses concurrently.

There was, he said, a widespread, honest difference of opinion, of long standing, as to the authority to decide upon disputed votes. Among believers in the power of the president of the Senate, he cited Senator Thompson, of Kentucky, and Senator Stuart, of Michigan, in 1857; Shellabarger, of Ohio, in 1869, Thomas F. Bayard, of Delaware, Whyte, of Maryland, and Stevenson, of Kentucky, in 1876, and the somewhat doubtful opinion of Chancellor Kent; and among believers in the powers of the two Houses, J. J. Crittenden, of Kentucky, and Pugh, of Ohio, in 1857; Colfax, of Indiana, in 1869; Schenck, of Ohio, Boutwell, of Massachusetts, Thurman, of Ohio, Christiancy, of Michigan, Frelinghuysen, of New Jersey, and Dawes, of Massachusetts. He confuted the theory that one House alone was the depository of the power, argued that in this confusion of opinion the sole way out of the difficulty was to enact the bill into law, and, in support of the constitutionality of the measure, urged reasons similar to those advanced in the Senate.

Eppa Hunton, of Virginia, followed McCrary in similar strain. The joint resolution, which had been approved by Lincoln, and the twenty-second joint rule, which had been applied in 1865, 1869, and 1873, were, he declared, *quasi* legislation. Each served in its time to count for some particular occasion. "The present bill only provides for this occasion,"—which was its chief vice. The constitutionality of the measure could not be affected whether the provision covering the count were controlled by concurrent or joint resolution, joint rule, or by bill. George F. Hoar, of Massachusetts, also spoke in its favor, declaring it not a compromise bill. "There is not a drop of compromise in it," as it allows every argument of either party to be presented to a tribunal so constituted as to ensure a righteous decision, "so far as the lot of humanity will admit."

Hale, of Maine, was against the measure. A single

man, he said, the fifteenth commissioner, was to decide this election. He believed in the power of the president of the Senate to count; as long as one man was to count, he saw no propriety in substituting the fifteenth commissioner for the constitutional authority. He had no fear of trusting the president of the Senate, and did not believe in invading the judiciary to take a man from it to perform such an unconstitutional function. Hewitt, of New York, unnecessarily lauded the bill. "The very spirit and essence, the pineal gland of the Constitution, is in the proposed measure." He declared it to contain the genius of Magna Charta, the great petition of right, the settlement of 1688, the Declaration of Independence. Springer, of Illinois, made an elaborate and forcible argument for the bill. Reviewing the proceedings in the convention of 1787 he showed how the clause as to the counting of the votes, reported by Brearley on September 4th, provided that the president of the Senate should open the votes in the Senate alone and that if there were no election by the electors, the Senate should be empowered to elect. These provisions were criticised as giving the Senate too much power in the selection of President, and the clause for that reason was so modified as to require the opening of the certificates in the presence of the two Houses. The Morton bill, introduced in the last session of the Forty-third Congress and passed in the first session of the existing one, Springer declared, was subjected in the Senate to a discussion most exhaustive and as able as was ever given to any measure in Congress. "The action of Congress on the Ross bill of 1800, the Van Buren bill of 1824, and the Morton bill of 1875-6 constitute precedents fully establishing the authority of Congress to pass the first section of the joint committee's bill,"—in relation to single returns. The precedent, he continued, went even further and justified the provision for double returns. Here was no

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improper delegation of power, inasmuch as the commission was merely to make a *prima facie* case for the two Houses to act upon. The counting of the votes would thus in the end be the act of the two Houses.

The argument of Garfield against the bill is in many respects one of the ablest addresses delivered at that session of the Houses. He brushed aside all fears of civil war if the measure were not made law, and inquired what would be its effect upon our institutions. An answer could not be made without a brief reference to history. The men who framed the Constitution were deeply versed in the political philosophy of their day and had learned from Montesquieu, Locke, Fénelon, and other great teachers that liberty is impossible without a clear and distinct separation of the three powers of government. The fathers used the utmost precaution to hedge the electoral system about with every conceivable protection against the interference or control of Congress. Recalling the provisions of the Constitution regarding electors, he declared that "within these simple, plain limitations, the electoral colleges are absolutely independent of the States and of Congress. . . . These colleges are none the less sovereign and independent because they exist only for a day." Analyzing the clause providing for the opening of the certificates, which ends with the words "the votes shall then be counted," he said: "Here the language changes from the active to the passive voice, from the personal to the impersonal; to the trusted custodian of the votes, succeeds the impersonality of arithmetic." Comparing the bill with the constitutional plan, he declared that it assailed and overthrew that plan to its very foundations.

"Coming only as an invited guest to witness a grand and imposing ceremony, this bill makes Congress the chief actor and umpire in the scene, and, under cover of the word

'count,' proposes to take command of every step in the process of making a President. . . . Pass this bill, and the old constitutional safeguards are gone. Congress becomes a grand returning board from this day forward . . . ."

The joint rule was the cause of most of our entanglements, and he unconsciously arraigned his party for originating that rule.

"At the last session of Congress, every Senator, without distinction of party, voted to declare it unwarranted by the Constitution. . . . The plain declaration of the first section [of this bill] is that Congress may, at its discretion, for any reason, good or bad, or for no reason, stifle the vote of a State. The Constitution commands that the votes shall be counted; the bill declares that the votes may be rejected. It is a monstrous assumption, a reckless usurpation of power."

Congress had no more authority than Great Britain to say that a State shall not vote. By the Constitution, the agency of Congress was narrowed down to a mere shadow, to a presence. It is said that the words "in the presence" of the two Houses imply that they are to take some part. The Constitution never intended the two Houses to count the votes. "Formulate that construction in definite words" and the Constitution "will read: 'In the presence of the two Houses, the votes shall be counted by the two Houses.' That is, they shall count the votes *in their own presence*. Let us not charge the framers of the Constitution with such stupid tautology." Congress might legislate upon the subject wherever the Constitution had made legislation possible. As to the second section of the measure, empowering the commission, in the first instance, to determine upon disputed dual returns, he argued that here was an unlawful delegation of power. If it were a delegation of legislative power, it was clearly in conflict with the Constitution; if

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the power were executive or judicial, then the members of the commission were officers of the United States, but were not appointed as the Constitution requires.

Mills, of Texas, was also among the dissenters. Under the terms of the bill, the award of the joint commission would require the concurrence of both Houses to reject it, which was tantamount to declaring that the assent of but one House would sustain it, thereby allowing one House to count the votes and declare the President elected,—which was what actually happened. “No man can legally be the President of the United States, unless both Houses have concurred in declaring him elected, or both Houses have concurred in declaring no one is elected, and the House elects.”

Lamar, of Louisiana, combated Mills. Under the Constitution both Houses were present to witness the count. If they should retire and declare they had witnessed not the count, “but a fraud and a lie,” the whole proceeding would be void. The two Houses testify whether the right vote was counted. This implies power to discriminate between legal and illegal votes. The bill devised a method by which, in case of double returns, the Senate and the House might ascertain the legal vote, which ought to be counted. Such a measure was within the residuary powers of Congress.

Baker, of Indiana, another opponent of the bill, correctly said that it had never entered the minds of the sages of the Constitution that more than one electoral college would claim to be appointed in any State, nor that two sets of certificates from rival electoral colleges would ever be transmitted to the president of the Senate. In the eyes of our fathers the count was never expected to involve an inquiry. He denied the power of Congress to delegate any of its functions, whatever they were, to a commission. The commission was not fitly constituted for the safe settlement of the matters confided to it for



decision. Its jurisdiction was not defined with sufficient precision nor were the modes of its procedure accurately prescribed.

Watterson, of Kentucky, supported the bill, declaring that Senator Edmunds had made it clear that the bill was constitutional and that he accepted and adopted Edmunds' view without reservation. Bland, of Mississippi, hoped that the bill would secure substantial justice, while Lapham and Townsend, of New York, both disapproved of it, believing that it deprived the president of the Senate of his immemorial power. Harrison, in depicting the crisis which would arise if the president of the Senate should declare Hayes President and the House Tilden, said no man who lived could predict what would happen in such a contingency. He denied the power of the president of the Senate to count, and concluded by saying: "With the lights before me I hold that the Constitution requires a law to put this clause into effect." But special legislation, such as the Electoral Commission act, was not the sort of legislation alluded to by Chancellor Kent in his oft-quoted *dictum*.

Knott claimed that there could be no controversy over the question of the right of Congress to count, for the Houses undoubtedly possessed the power to decide upon disputed votes, but they had no power to delegate their functions to a commission. Conceding the claimed authority of the president of the Senate, that officer could not be stripped of his constitutional prerogative; if the House had the power, it, in turn, could not renounce it. The residuary clause did not confer authority to create such a tribunal. Congress, under pretence of aiding the President in an emergency, might strip him of his powers as commander-in-chief and transfer them to a commission. He reiterated the argument, which had several times been heard in the Senate, that the bill was unconstitutional because under its terms the votes were

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not to be counted in the presence of the two Houses. Carr, in an elaborate address, expressed his hope that the judges would hold themselves aloof from the commission. Hardenburgh and Lawrence, of Ohio, also opposed.

The vote, after a great volume of discussion, was reached on January 26th, when the bill was sustained by 191 yeas to 86 nays, 14 not voting.<sup>1</sup>

Debate in both Houses had been prolonged to tediousness, but the country remained tranquil and patient, realizing that the discussion involved the meaning of a transcendently important constitutional provision, touching the succession to the presidency. Argument was as full and exhaustive as if the subject had not been the theme of perennial controversy. The law which was the fruit of the joint committee's efforts is itself a legislative declaration of the doubt of Congress as to its own authority. The act, by its own terms, in its provision referring double returns to the consideration of the Electoral Commission, concedes its own questionable constitutionality, since it purports to clothe the commission "with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together." If Congress lacked power, it could not constitutionally legislate upon the subject at all, nor confer any authority upon a commission. The outcome of practically one hundred years of discussion of a brief clause of the Constitution was a law confessedly temporary in its operation, in which the doubts of a century are crystallized into statutory form. It is hardly probable that in the whole

<sup>1</sup> Blaine, in his *Twenty Years of Congress*, analyzes the vote on the Electoral bill as follows :

" In the Senate, 26 Democrats voted for the bill and 1 against it.

" In the Senate, 21 Republicans voted for the bill and 16 against it.

" In the House, 160 Democrats voted for the bill and 17 against it.

" In the House, 31 Republicans voted for the bill and 69 against it.

" In the two Houses jointly, 186 Democrats voted for the Electoral bill and 18 against it ; while 52 Republicans voted for the bill and 75 against it."

range of congressional legislation a parallel utterance can be found. The act was in every sense a compromise, despite Conkling and Hoar to the contrary. It was a renunciation by Congress of the power with which it claimed to be constitutionally vested,—an evasion of arrogated authority worse than “alternative counting,” a peace-at-any-price measure. It referred the disputed returns to a commission of extra-constitutional origin; and while nominally retaining plenary authority over the commission’s report, both Houses deliberately tied their own hands so as to compel approval of that report, because it was almost scientifically demonstrable that the two Houses would not agree to overthrow the commission’s verdict. It was the case of a plaintiff and defendant assenting to a reference or arbitration, and agreeing that the decision of the referee or the award of the umpire should stand unless both contestants should acquiesce in setting it aside. A bill referring the discordant electoral certificates to a commission for its report, but expressly reserving all the constitutional powers, if any, of the two Houses, to approve or overrule the report, would have incurred certain defeat. Nothing would content Congress except a law that rendered a reversal of the commission practically impossible unless one party or the other abandoned its pretensions. There is but one explanation of such remarkable legislation,—not consolatory to the dignity of the nation,—which is, that the antagonistic parties agreed upon this mode of arbitrament solely because each had deluded itself with the belief that by the creation of this commission it was sure to win the prize.

The bill received executive approval on January 29, 1877; and on January 30th both the Senate and the House *viva voce* named their respective representatives upon the commission. The Senate appointed George F. Edmunds, Oliver P. Morton, Frederick T. Frelinghuy-

sen, Thomas F. Bayard, and Allen G. Thurman, as the senatorial members of the commission; and the House designated from its body Henry B. Payne, Eppa Hunton, Josiah G. Abbott, James A. Garfield, and George F. Hoar. It is almost needless to add that three of the Senators were Republican and two Democratic; and that from the House came two Republicans and three Democrats. While the measure was under consideration in Congress, the common assumption appears to have been that the choice of the four justices who were named in the bill would make Justice David Davis, who had been nominated to the Supreme Court by President Lincoln, the fifth judicial member. The first blow of fate came in his sudden and unexpected election by the Illinois Legislature, by a Democratic majority, to the senatorship from that State, as the successor of John A. Logan, on the afternoon of January 25th. Judge Davis' election was treated as rendering him ineligible to a place upon the commission, and "the four judges"<sup>1</sup> unanimously selected Associate Justice Joseph P. Bradley as the fifth justice and the "fifteenth member" of the commission. Sherman's "element of blind chance" seemed to be at work even before the bill had become law.<sup>2</sup>

The Electoral Commission was organized on January 31, 1877. Without impugning the good faith of a single member, the outcome of its proceedings might have been predicted.

<sup>1</sup> "The four judges" were Clifford, Field, Miller, and Strong.

<sup>2</sup> "The Electoral Commission was, in a large degree, the creation and offspring of the Democratic party; its leading members uniting for that purpose with patriotic Republicans willing to surrender a political advantage to secure the peace and tranquillity of the country, seriously imperilled, as they believed, by threats of Democratic leaders, who asserted that if the Republican candidates should be declared elected by the president of the Senate, the House of Representatives would proceed to elect, and forcibly install, Tilden as President."—125 *N. A. R.*, 198, E. W. Stoughton.

## CHAPTER VI

### THE CASE OF FLORIDA BEFORE THE ELECTORAL COMMISSION

**I**T was shown in the preceding chapter that the Electoral Commission law failed to define the powers of the commission. Congress vested, or attempted to vest, the commission with the powers, if any, of the two Houses, acting separately or together, to decide upon conflicting returns. All amendments offered to the bill in order to insure explicit delimitation of authority were voted down. So far from bestowing unmistakable jurisdiction upon the commission, Congress was unable to make any clear affirmation as to the extent of its own authority, and attempted none. Upon one proposition the two Houses by a substantial majority were in accord—that the president of the Senate had no constitutional power to count the votes; yet, by the irony of fate, the elaborate machinery invented to depose him, and confide the function to Congress, resulted in exactly such a decision as might have been expected had the president of the Senate, in the presence of the two Houses as witnesses, discharged this duty. That official in all probability would have declared the first certificate received from Florida, Louisiana, or South Carolina, purporting to come under the seal of the State and the authentication of its governor, the valid return in each instance; which was precisely the decision of the commission by a vote of 8 to 7. The only circumstance to be pleaded in palliation of the Elec-

toral Commission law is that the decision of the president of the Senate might not have been accepted by both parties. History thus presents the anomaly of the acquiescence by a free and intelligent people in an extra-constitutional device for settling a disputed presidential succession, whereas the employment of what was probably intended to be the constitutional method, the method proposed in the resolution of the convention of 1787, adopted in 1789, and apparently approved for years afterwards, might not have been peacefully accepted.

Some reference to the subject of returning boards should precede an account of the cases presented to the Electoral Commission. While the laws of the States varied widely, each State had some kind of canvassing or returning board, by which the returns sent from the various districts or counties were canvassed and the result of the election was authoritatively declared. In Oregon the functions of a canvassing board, in the opinion of a majority of the commission, were concentrated in the Secretary of State of that State; in other States these duties were reposed in several designated State officers. All such canvassing boards, however constituted, ordinarily discharge ministerial functions only. As Judge Cooley says, they are "not vested with judicial powers to correct errors and mistakes that may have occurred with any officer who preceded them in the performance of any duty connected with the election, or to pass upon any disputed fact which may decide the result." But in 1876, in at least three States, it was claimed that a broader authority had been given by legislation to the State canvassing or returning board, and the Supreme Court of one of those States, Louisiana, prior to the election of that year, had sustained as constitutional the extraordinary grant of authority to the board, in certain circumstances, to exclude returns. In Florida, as will hereafter be seen, the highest tribunal of the State, in the decision

of a suit between rival candidates for the governorship, held such a judicial delegation of power to a returning board to be unconstitutional.

The Florida statute of February 27, 1872, constituted the Secretary of State, Attorney-General, Comptroller of Public Accounts, or any two of them, together with any other member of the Cabinet designated by them, a board to canvass the returns of the elections, and determine and declare who had been elected State officers and presidential electors. The statute provided that if any returns should be shown or should appear to be so irregular, false, or fraudulent that the board should be unable to determine the true vote, the board should so certify and should not include such return in its determination and declaration; and the Secretary of State was required to preserve on file in his office these returns, with all documents received by him or the canvassing board. Under this statute, the returns of the election for presidential electors in Florida were canvassed in 1876. On December 6, 1876, the day for the electors to vote, the canvassing board certified that Humphreys, Pearce, Holden, and Long had been appointed electors and on the same day the governor, Marcellus L. Stearns, issued them a certificate as prescribed by the Act of Congress of 1792. They met together later in the day, balloted and transmitted to Washington a properly certified return showing that they had voted for Hayes for President and for Wheeler for Vice-President. Likewise, on December 6th, four Democrats, named Call, Yonge, Hilton, and Bullock, claiming to be electors, met, cast their ballots for Tilden for President and Hendricks for Vice-President, and sent an appropriate certificate to Washington. By that certificate it further appeared that, believing themselves to have been chosen electors by popular vote, they made demand upon the governor for a certificate, which was refused. As O'Connor, one

of the Democratic counsel, subsequently stated to the Electoral Commission,

“ Every form prescribed by the Constitution, or by any law bearing upon the subject, was equally complied with by each of the rival electoral colleges, unless there be a difference between them in this: The certified lists provided for in section 136 of the Revised Statutes [Act of 1792] were, as to the Tilden electors, certified by the Attorney-General, and were, as to the Hayes electors, certified by Mr. Stearns, then Governor. All this appears of record and no additional evidence is needed in respect to any part of it.”

The Democratic candidate for the governorship, Drew, brought suit in the Supreme Court of the State in December, 1876, against Stearns, the Republican candidate for re-election, to try the title to the office, and this suit resulted in a judgment directing the board of canvassers to make another count of the votes for governor and State officers, rejecting all testimony of irregularity and fraud, except such as might appear on the face of the returns. A proceeding in *quo warranto* had also been instituted in the Circuit Court of the State, in the second judicial circuit, by the Tilden electors against the Hayes electors, to test the title to the electoral office. This suit was begun on December 6, 1876, the day when the electors were required to meet to vote, but, according to Commissioner Miller, it was not shown whether the writ was actually served before the vote by the Hayes electors or afterwards. This *quo warranto* resulted, on January 25, 1877, in a decree which adjudged that the Hayes electors were not, on December 6, 1876, or at any other time, entitled to assume or exercise the functions of electors, but were mere usurpers, and their acts illegal and void, and that the Tilden electors had been duly appointed.

After the Supreme Court in the Drew case, *i. e.*, the



suit by Drew against Stearns, had given a construction to the election law and had held that the canvassers improperly and illegally exercised judicial functions in rejecting votes, the Legislature, on January 17, 1877, passed a law to correct the count, entitled "An act to provide for a canvass according to the laws of the State of Florida, as interpreted by the Supreme Court, of the votes for electors for President and Vice-President, cast at the election held November 7, 1876." The act required the new canvassing board to recanvass the returns and determine and declare who were appointed electors at that election, as shown by the returns on file in the office of the Secretary of State. The canvassers made the directed canvass, and certified that the Tilden electors had received a majority of the votes. Thereupon, on January 26, 1876, the Legislature passed an act declaring the Tilden electors duly chosen and appointed and entitled to exercise the powers and duties of the office of electors on December 7, 1876, and ratified and confirmed the acts of the Tilden electors. It also directed the new governor to certify in due form, in conformity with the Act of Congress of 1792, the lists prepared by the Tilden electors and to transmit the same, with an authentic copy of the act of the State Legislature, to the president of the Senate, and declared such lists to be as valid and effectual as if they had been made, delivered, and transmitted on December 7, 1876, and further declared the Hayes certificates void. It also required the governor to cause three other lists of the names of the Tilden electors to be made, certified, and delivered to such electors, and required them to meet at the State capital and make and sign three additional certificates of the votes given by them on December 6, 1876, one list of electors furnished by the governor to be annexed to each; and furthermore required that these three certificates should also be transmitted as prescribed in the Act of Congress

of 1792. The governor and the Tilden electors obeyed the new law. "None of these proceedings," as was said by Commissioner Clifford, "were intended to choose new electors, but merely to ascertain who were elected at the antecedent general election."

Early in the session of Congress which commenced on December 5, 1876, the House of Representatives appointed a committee of investigation to ascertain the facts and report the truth as to who had been elected electors in the States of Florida, Louisiana, and South Carolina. The committee, proceeding to Florida, took a vast mass of testimony, which it returned, with its conclusions, to the House on January 31, 1877. The report recommended the passage by the House of a resolution stating that the Tilden electors had been fairly and duly chosen and declaring the votes cast by them for Tilden and Hendricks, "the legal votes of Florida," to "be counted as such." This resolution was subsequently adopted by the House by a vote of 142 yeas to 82 nays. While allowance must be made for the excited state of public feeling at the time, it is evident that the House exceeded its prerogatives in passing the resolution. The count of the electoral vote is not confided by the Constitution to the House of Representatives, but is to take place in joint session of the Houses when the lists have been opened. The action of the House was revolutionary. A sub-committee on privileges and elections of the Senate, after investigating the Florida case, made a report adverse in its conclusions to those of the House committee, but the report was never adopted by the Senate.

The two Houses, on January 31, 1877, convened in joint meeting to count the electoral vote. On the same date the Electoral Commission met and organized in the Supreme Court room at the capitol, with Justice Clifford as presiding officer. The returns from the States were

taken up by the two Houses in alphabetical order. The first case which arose for reference to the commission was that of Florida, and the hearing in that case began on February 2, 1877. An array of distinguished counsel gathered in the chamber of the highest tribunal of the nation to represent the Democratic and the Republican candidates for the presidency and vice-presidency and to advocate, by every argument which learning or ingenuity could furnish, the causes of their respective clients. Besides legal representatives from both Houses of Congress, O'Connor, of New York, Black, of Pennsylvania, Merrick, of the District of Columbia, Green, of New Jersey, Carpenter, of Wisconsin, and Hoadley, of Ohio, appeared for the Democratic side; while Evarts and Edwin W. Stoughton, of New York, and Stanley Matthews and Samuel Shellabarger, of Ohio, appeared to support the Republican cause. A hearing more impressive in character or fraught with greater consequences has never taken place in that celebrated chamber, the scene of many notable forensic discussions.

Mr. O'Connor truly declared the cause

"to be the most important that has ever been presented to any official authority within these United States." . . . It is brought here under circumstances that give absolute assurance, as far as absolute assurance can exist in human things, of a sound, upright, intelligible decision that will receive the approval of all just and reasonable men. The great occasion which has given rise to the construction of this tribunal has attracted the attention of every enlightened and observing individual in the civilized world. This commission acts under that observation. The conclusion at which it may arrive must necessarily pass into history, and, from the deeply interesting character, in all their aspects, of the proceedings had and the judgment to be pronounced, that history will attract the attention of students and men of culture and intelligence as long as our country shall be remembered; for it cannot be

supposed that a question will ever arise and be determined in a similar manner which, by its superior magnitude, importance, delicacy, and interest, will obscure this one or cause it to be overlooked."

Three separate "sets of lists" or returns had been received by the president of the Senate from the State of Florida, the first being a return signed by Humphreys, Pearce, Holden, and Long, the four Hayes electors. To this return, which bore date December 6, 1876, was attached the certificate of Marcellus L. Stearns, then governor of the State, also dated on that day. Return No. 2 consisted of a list, dated December 6, 1876, signed by the Tilden electors, authenticated, not by the governor's certificate, but by the certificate of the attorney-general of the State as one of the members of the State board of canvassers; and appended to the return was an additional certificate of the electors themselves to the effect that Governor Stearns had refused to comply with their demand for a certificate of their appointment. Certificate No. 3, like No. 2, was signed by the Tilden electors, but was authenticated by the certificate of George F. Drew, the governor who took office January 1, 1877. This return bore date January 26, 1877. Governor Drew's certificate recited the *quo warranto* proceedings begun by the four Tilden electors against the four Hayes electors and the judgment of the court declaring the Tilden electors duly elected. It recited also the act of the State Legislature passed January 17, 1877, directing a recanvass of the vote for electors and stated that such recanvass had been made, with the result of establishing the election of the Tilden electors.

To the first return, which attested the election of the Hayes electors, the counsel for Mr. Tilden objected that the so-called Hayes electors were not appointed electors in the manner directed by the Legislature of the State;

that the qualified voters of the State had actually appointed Call, Yonge, Hilton, and Bullock electors; that the certificates issued to the pretended Hayes electors and the lists made by them had been annulled by a subsequent lawful certificate of the executive of Florida, in which the Tilden electors were declared to be the lawful electors, duly appointed by the State in the manner directed by its constitution and also by the act of the State Legislature and the *quo warranto* decree in the suit of the Tilden electors against the so-called Hayes electors; that the Tilden electors had lawfully cast the electoral vote of the State; and that the certificate issued by Governor Stearns to the Hayes electors had been annulled and declared void by the executive and by the Legislature and judiciary of the State.

A special objection was made to the return signed by the Hayes electors, that one of their number, Humphreys, was, at the date of his appointment as an elector, a United States shipping commissioner at the port of Pensacola, and that his appointment was null and void under the constitutional provision prohibiting any Senator or Representative or any person holding a Federal office of trust or profit from appointment as an elector.

To each of the two returns made by the Tilden electors, counsel for Mr. Hayes made various objections, in effect that the return signed by the Hayes electors was the only valid return and that its acceptance precluded consideration of the others. To return, No. 2 they objected because of its lack of certification, as required by the Federal law of 1792, by the governor of the State in office at the time of the election. To the third return they objected that, while it bore the certificate of a governor of the State, he was not governor on the date when, by the law of 1792, the electors were required to convene and vote; that the return itself was predicated upon a new canvass, made under a statute not in exist-

ence when the electors were appointed, but subsequently enacted. They declared the return to be *ex post facto*, made after the electoral college had become *functus officio*, and they objected to the *quo warranto* decree in the suit between the rival electors as null and void and of no effect upon the title of the electors returned by the State canvassing board in December, 1876, as duly elected. To the decree adjudging Drew to have been lawfully elected governor of the State and the action of the returning board with respect to the electoral votes fraudulent, they objected as *obiter*, on the ground that, assuming the jurisdiction of the tribunal over the subject the validity of the return of the State canvassing board regarding the electors was not in issue in that suit.

After some preliminary discussion O'Connor formulated the Democratic offer of proof in a series of propositions, none of which seemed to require extrinsic evidence other than the documents attached to the objections, except the following:

"Fifthly. The only matters which the Tilden electors desire to lay before the Commission by evidence actually extrinsic will now be stated:

"I. The board of State canvassers, acting on certain erroneous views when making their canvass, by which the Hayes electors appeared to be chosen, rejected wholly the returns from the county of Manatee and parts of returns from each of the following counties: Hamilton, Jackson, and Monroe.

"II. Evidence that Mr. Humphreys, a Hayes elector, held office under the United States."

It is unnecessary to review in detail the elaborate arguments made by the Democratic counsel in support of their offer of proof, nor the counter-arguments against its reception. The Democrats contended that the governor's certificate which the Act of 1792 requires to be

annexed to the electors' lists was not an absolute prerequisite to a valid return, because the Constitution contained no such requirement and the statute could not go beyond the terms of the Constitution. The certificate issued by Governor Stearns to the Hayes electors possessed no superior sanctity, but could be inquired into and proof should be given that the certificate was not in conformity with the fact. If the governor, by mistake or fraud, should furnish a certified list in favor of persons not appointed electors, was there, they asked, no remedy? must the State lose its vote, or have its vote cast against its will, as if by a false personation made before its eyes, in the open day, which it has no power to resist?

If the State returning board or the executive of the State transcended its or his authority in making a false return or certificate, such act, they argued, was *ultra vires* and void; it was *electing*, instead of determining the result of an election. They appealed with confidence to the judgment in *Drew against Stearns*, the adjudication in *Call vs. Pearce*, the suit of the Tilden electors against the Hayes electors, and the act of the Legislature of January 26, 1877, and they also argued that Humphreys was ineligible to appointment as an elector. Counsel for Mr. Hayes, in resisting the introduction of the proffered evidence, argued that certificate No. 1 was valid and the other two void. The commission, they insisted, was not a general canvassing board. Their arguments tended to restrict its powers and the powers of the two Houses of Congress within the limitations understood to apply to the powers of the president of the Senate. The duty of counting the votes was purely ministerial. Your power, they said to the commission, is broad enough to ascertain whether the papers before you, as certificates, are genuine and not counterfeits and have been verified by the State authority as required under the Constitution and laws; broad enough

to enable you to ascertain whether the electoral college has duly complied with the law. But it is the electoral, and not the popular vote, that is to be counted. The question is not which set of electors in Florida received a majority of the popular vote, but which set, by the actual declaration of the final authority of the State charged with the duty of determining the result, became entitled to cast the electoral vote of the State. Counsel, moreover, repudiated the notion that either Congress or the commission could investigate the popular vote. The inquiry would be physically impossible, because it could not stop at the first stage of the descent, but must go to the bottom; it was legally impossible, because the Act of 1792 prescribed the evidence of the appointment of electors, and it was constitutionally impossible, because there was no judicial power in Congress or the commission. Such power was vested by the Constitution in the Supreme Court and in such inferior courts as Congress should ordain and establish, and clearly the commission was not an inferior court, since appeal from its decision lay, not to the Supreme Court, but to Congress.

As to the alleged disqualification of Humphreys, the Republican view was forcibly stated by Evarts:

“If a disqualified elector has passed the observation of the voters in the State, passed the observation of any sentinels or safeguards that may have been provided in the State law, when these are all overpassed and the vote stands on the presentation and authentication of the Constitution—that is, upon the certificate of the electors themselves and the governor,—it must stand unchallengeable and unimpeachable in the count.”

Or, as Shellabarger phrased it,

“if an elector on the voting day is endowed with all the insignia of right, with all the apparent title of office that *can*, according to the then existing State machinery, be held on that



day, he is, to every possible legal intent, *as against the States*, the elector both *de facto* and *de jure*. If, after that, any power can try the title, it is not the State, but the nation. . . . That boundary is at the point where the vote is sealed and goes to the capital. . . . Before that vote, the State must have done her last act in adjudging who are her electors and bestowing the evidences of their title."

The battle was fought over the offer of proof. The decision of the commission, by a vote of eight to seven, not to receive evidence outside of the certificates, except as to Humphreys' eligibility, foreshadowed the result of the whole controversy and portended the defeat of the purpose of the Democratic counsel to go behind the returns. Its decision was that "it is not competent under the Constitution and the law, as it existed at the date of the passage of said act" [the Electoral Commission law],

"to go into evidence *aliunde* the papers opened by the president of the Senate in the presence of the two Houses to prove that other persons than those regularly certified to by the governor of the State of Florida, in and according to the determination and declaration of their appointment by the board of State canvassers of said State prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the Legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose."

Although the counsel for the Republican candidates had argued that the acts of Humphreys, as a *de facto* elector, were valid, the commission, by a vote of eight to seven (Bradley, the fifteenth member, voting upon this question with the Democratic members of the commission), de-

cided to receive evidence as to Humphreys' disqualifications. After hearing the evidence, the commission, by the same vote, was of the opinion that "without reference to the question of the effect of the vote of an ineligible elector, the evidence does not show that he held the office of shipping commissioner on the day when the electors were appointed."

The opinions of the commission exhibit the immemorial doubt as to where the Constitution intended to repose the power to count the votes. This tribunal declined to express any definite opinion as to the authority of the two Houses of Congress; nor were the eight members who voted to exclude the Democratic offer of proof in accord in their reasons for such exclusion. It is an interesting circumstance, however, that the prevailing theory was in reality more democratic than the theory advocated by the Democratic counsel, or, if not more democratic, more strictly consonant with the Constitution. As was anticipated when the Electoral Commission bill was under discussion, the commission divided along political lines upon every question, save that Bayard admitted that he had become satisfied as to Humphreys' eligibility. That Senators and Representatives recently transferred from the partisan arena of Congress should have been unable instantly to assume judicial-mindedness is, perhaps, not remarkable; but that the four justices of the Supreme Court selected by law should have differed in the same manner, evinces how profoundly political beliefs, like religious and philosophical convictions, affect human action. Morton held that the only issue to be tried was whether certificate No. 1 came from the electors. This was established by the determination of the State returning board and Governor Stearns' certificate. It was not in the power of the State to undo or impair what she had done, by subsequently declaring that the electors who had voted had not been appointed, and

that by a recount of the votes, real or pretended, other persons were shown to have been appointed. Morton also approved of the doctrine that an elector who had been declared elected by the State returning officers and had received the governor's certificate had the color of office, and was an elector *de facto*, whose acts were valid. All contests or corrections should be concluded before the vote of the electors was cast. Frelinghuysen quoted from a letter written a few days previously by Chief Judge Church, of the New York Court of Appeals, a distinguished Democrat, stating that the authentication of the election of presidential electors according to the laws of each State is final and conclusive, and that there exists no power to go behind it. As to Humphreys' case, he argued that the provision of the Constitution on which the charge against that elector was based was not self-executing, and no machinery had ever been devised for an investigation to determine upon electoral disqualifications. Hoar regarded the determination of the canvassing board as in the nature of a judgment. The subsequent proceedings of the State Legislature were without validity, and "the right of a State to withdraw the vote of its electors for President, in obedience to the decree of a court entered afterwards, will not bear discussion." Garfield claimed that neither the two Houses nor the commission had the power to revise the action of the State as evidenced in certificate No. 1. Thurman, Bayard, Abbott, and Hunton, on the other hand, insisted that the decision of the State canvassing board was impeachable, and that every department of the State government, executive, legislative, and judicial, had decided against the pretensions of the Hayes electors. Bayard declared: "If a State cannot succeed by the united voices of its three branches, executive, legislative, and judicial, in establishing a fact transacted under its own laws and within its own limits, it is idle to talk

of State existence or State rights." In Florida, said Abbott,

"we have this strange spectacle: The governor and all the State officers having been voted for on the same ticket with the Tilden electors, having received substantially the same vote, and having been counted out by the same board of canvassers, have been declared elected by the highest judicial authority of the State, and are now exercising the powers of their respective offices peaceably and to the general contentment of the whole people, while the Tilden electors, we are told,—although they, too, have been declared elected by the courts,—have no power to act and their vote must not be counted. . . . Where do we get the right to set up our construction or rather the construction of the State board of canvassers, of a statute of Florida, against the Supreme Court of Florida?"

And Thurman urged the repeated scrutiny by Congress of the vote of a State as a reason why such procedure should again be followed: "The power of the two Houses to go behind the governor's certificates and the decisions of canvassing boards has been again and again asserted by Congress and carried into execution."

That certificates were, *prima facie*, always open to rebuttal, was the idea of Mr. Justice Field, and he pronounced the doctrine that a fraudulent, coerced, or mistaken canvass was conclusive "as unsound in law as it is shocking in morals." The canvassing board had only ministerial powers. After elaborately reviewing all the proceedings in Florida following the election, he declared that there was the highest possible evidence of the action of that State, and that there could be no serious question as to which of the two sets of electors had been duly appointed. "That State has spoken to us through her courts, through her Legislature, and through her executive, and has told us in no ambiguous terms what

was her will and whom she had appointed to express it."

Mr. Justice Strong regarded the offer of proof as equivalent to asking the commission to recanvass a State election for State agents or officers. Has Congress, he inquired, the power to recanvass the votes and returns of votes given in a State for presidential electors, and answered, it had not.

"The framers of the Constitution well understood what was necessary to confer upon Congress, or upon either House, power to canvass elections or returns, and the subject did not escape their attention. When such power was intended to be granted, it was given in plain language. Each House was made a judge 'of the elections, returns, and qualifications of its members.' No such language was used respecting electors, and for what appears to me to be the plainest reason. The scheme of the Constitution was to make the appointment of electors exclusively a State affair, free from interference of the legislative department of the government. . . . Congress, therefore, had no right to enter into the consideration of the evidence offered, and the commission obviously has no larger authority than Congress had. The State possessed ample power to purify her own elections, correct erroneous canvasses, rectify false returns; but these things she should accomplish completely before the day of casting the electoral vote arrives."

He, like most of his associates, admitted that the governor's certificate was not unimpeachable. "It may be shown to be untrue by proof that it does not correspond with the determination of the canvassing board. It may be proved to be a forgery. But in the present case these things are not alleged." What was done in Florida after December 6th, he argued, was immaterial. Neither the action of the Legislature nor a *post hac* decision of a court could affect an act rightfully done, when it had

been completed before the Legislature and the court attempted to annul it. "There must be a finality in ascertaining the results of an election, and when the election is a mode of appointment of persons to cast a vote for a State on an appointed day, the finality must be on or before that day, else nothing can be settled." If, he added, "the votes of electors can be destroyed by State action after they have been cast, it may be done next July as well as it can be now." This last argument is untenable, because the Constitution itself interposes a bar to inquiry after the electoral votes have been counted in the presence of the two Houses, for it declares that the person having the greatest number of votes for President (if a majority) shall be President, and provides no machinery for contest or debate after the actual count has taken place.

Perhaps the greatest constitutional lawyer upon the Supreme Bench of that day was Samuel F. Miller, and his reasons for rejecting the Democratic offer of proof are worthy of note. As to Humphreys' eligibility, he claimed that the vote, being a fact accomplished, could not be annulled by any subsequent proceeding to question his eligibility, that the Constitution was not self-executing, and that since neither the Constitution nor Congress, nor Florida had created a tribunal or provided a mode of procedure by which the eligibility of an elector might be inquired into and determined, Humphreys, the *de facto* elector, rightfully cast his vote.

Upon the main question, he said:

"It is manifestly the duty and therefore the right of the State, which is the appointing power, to decide upon the means by which the act of appointment shall be authenticated and certified to the counting power and to the electors who are to act on that authority. To this proposition I have heard no dissent from any quarter. This evidence of

appointment must in its nature vary according to the manner in which the electors are appointed. If elected by the Legislature, as they may be, an appropriate mode would be the signatures of the presiding officers of the two Houses to the fact of such appointment or a certified copy of the act by which they were elected. If appointed by the governor, his official certificate with the seal of the State would be an appropriate mode. If elected by popular suffrage, that election should be ascertained and authenticated in the mode which the law of the State prescribes for that purpose."

After reciting the Florida statute, defining the duties of the State returning board, he said :

"When the canvassing board herein mentioned has canvassed the returns of the election, has determined who is elected, and has declared that fact by signing the certificate, which is to be deposited with the Secretary of State, the person named in the certificate is from that moment a duly appointed elector. The fact of his appointment, that is, his election, has been ascertained and declared by the tribunal, and the only tribunal, to which the duty and power of so declaring has been confided by law."

This is the best exposition to be found in any of the opinions concerning the appointment of an elector, which is completed, not by his election, but, as Mr. Justice Miller says, when the appropriate State authority certifies to that fact. The Florida board, he maintained, had not exceeded its jurisdiction, because the statute of Florida clothed it with power, upon all the facts submitted to it, "to determine, that is, to declare, who is elected." The only votes which the Constitution authorizes either the president of the Senate or the Houses to count are the votes of the electors of President and Vice-President, "and not the votes by which the electors are appointed." The certificates received at the seat of government from

the State authorities are evidence of the appointment of the electors. Summing up, he said :

“ Congress has nothing to do with this appointment, neither with the manner of appointment, nor the manner of authenticating the appointment.

“ If, then, a body of electors present with the vote which they cast for President and Vice-President the evidence which the State has prescribed of their appointment, the inquiry of the two Houses is answered. They have been legally and officially informed who are entitled to vote as electors for that State. . . . Much has been said of the danger of the device of returning boards, and it may be they have exercised their power in a manner not always worthy of commendation. But I take the liberty of saying that such a power lodged in one or in both Houses of Congress, would be a far more permanent menace to the liberty of the people, to the legitimate result of the popular vote, than any device for counting those votes which has as yet been adopted by the States.”

The “fifteenth” member of the commission, Mr. Justice Bradley, was more severely criticised than the other Republican members, probably for the unphilosophical reason that, while partisanship was expected of fourteen, the “fifteenth” member, the real judge, should have been unbiassed. It was his opinion that the president of the Senate had not the power to count,—that the Constitution devolved this duty upon the two Houses. But if examination was to be made by them, how far could the Houses go? “The extreme reticence of the Constitution leaves wide room for inference.” The appointment of electors belongs exclusively to the States; so completely is congressional and Federal influence excluded, that not a member of Congress nor an officer of the Federal Government is allowed to be an elector. This exclusive power and control of the State is ended and determined



when the day fixed by Congress for voting has arrived, and the electors have deposited their votes and made out the lists required by the Constitution. Until that time the whole proceeding, except as to the date of election, is conducted under State law and State authority. Congress, he declared, cannot institute a scrutiny into the appointment of electors by a State. The utmost it can do is to ascertain whether the State has made an appointment according to the form prescribed by its laws. In support of this view he referred to the proviso in the bill of 1800 that "no petition or exception shall be granted, allowed, or considered by the sitting grand committee, which has for its object to draw into question the number of votes given for an elector in any of the States, or the fact whether an elector was chosen by a majority of the votes in his State or district." The deduction was that neither the commission nor Congress had power to enter upon the proposed investigation. But, he said, inquiry naturally arises as to the manner in which the electors appointed by a State are to be accredited. The certificate of the governor demanded by the Act of 1792 is only *prima facie* evidence. The Houses may undoubtedly inquire whether the supposed certificate is genuine. The Houses would be bound to recognize the determination of the State board of canvassers as the act of the State, and, while they might go behind the governor's certificate, if necessary, they could do so only for the purpose of inquiring whether he had truly certified the results at which the board arrived. Discussing the Florida judgments, which were pressed by the Democratic counsel with great zeal upon the commission as conclusive, he asked "whether the subsequent action of the courts or Legislature of Florida can change the result arrived at and declared by the board of State canvassers, and consummated by the vote of the electors and the complete execution of their function." He confessed that at one stage of the pro-

ceedings he was inclined to consider the *quo warranto* decree as sufficient to contradict the determination of the State board of canvassers,—assuming, of course, that the court had jurisdiction of the case; but upon reflection, viewing the action of the board of canvassers as a determination, a species of judgment upon the vote of the State, a *quasi* judicial proceeding under the Florida statute, he had concluded that the judgment on the *quo warranto* was an attempted reversal of this decision, made without jurisdiction.

“ If,” he said, “ the court had had jurisdiction of the subject-matter, and had rendered its decision before the votes of the electors were cast, its judgment, instead of that of the returning board, would have been the final declaration of the result of the election. But its decision being rendered after the votes were given, it cannot have the operation to change or affect the vote, whatever effect it might have in a future judicial proceeding in relation to the presidential election. The official acts of officers *de facto*, until they are ousted by judicial process or otherwise, are valid and binding. But it is a grave question whether any courts can thus interfere with the course of the election for President and Vice-President. The remarks of Mr. Justice Miller on this subject are of great force and weight.”

Mr. Justice Clifford, president of the commission, probably stated the Democratic offer of proof with judicial accuracy :

“ Few, I presume, will deny that it is competent for the commission to take notice of the statutes of the State relating to the matter in controversy without any formal proof of their legal authenticity. Suppose that is so, then there are no matters involved in the legal issues presented which may not be thoroughly examined in a very few hours. Differences of opinion may exist as to the legal effect of the evidence, if admitted, but I have yet to learn that any one denies that

the alleged facts are capable of being proved by authentic documents in the archives of the State. Certified copies of the records and judgment of the court in the *quo warranto* proceedings are also here, ready to be introduced, and no one, I suppose, will deny that a duly exemplified copy of a record or judgment between the same parties would be admissible in this case, unless it be held that the action of the State canvassers or the certificate of the governor closes the door to all investigations."

That neither the return of the State board nor the governor's certificate concluded inquiry, he then proceeded to argue.

None of the proceedings subsequent to December 6, 1876, "were intended to choose new electors"; they were "merely to ascertain who were elected at the antecedent general election," and the Democratic contention was stated, with great impressiveness by Justice Clifford, when he said:

"Repeated admissions have been made during the discussion that a State may determine what persons the qualified voters have chosen and appointed electors of President and Vice-President, but the proposition is advanced that the determination must be made before the electors meet and cast their votes, and that it cannot be made at any subsequent time. Antecedent investigation could not be made in this case before the electors voted, for the reason that the old board of State canvassers did not make their return until the day when the votes were cast, nor were the Hayes electors furnished with the certificate of the governor until that day. All that could be done by the way of investigation before that time was done, as appears by the certificate of the Attorney General, which was also given to the Tilden electors on the same 6th of December. Without a moment's delay the Tilden electors sued out a writ of *quo warranto* against the usurpers, and by extreme diligence caused it to be served on them one hour before they cast their votes. Weighed in the light of

these suggestions, the proposition that subsequent investigation cannot be made is monstrous, as it shows a mockery of justice. You may investigate before the votes are cast when it is impossible for want of time, but you shall not after that, as you would then have an opportunity to ascertain the truth!"

The following seems to be a fair summary of the points actually decided by a majority of the commission: (1) Congress has nothing to do with the appointment of electors or the manner of their appointment. The single function of an elector is to give one of the votes to which the State is entitled for President and Vice-President. His powers begin and end there. He has no permanent office with continuing functions. (2) When the State canvassing authority has declared who has been elected an elector and has so certified in accordance with the law of the State, the person named in that certificate is a duly appointed elector, whose title, if he be not constitutionally disqualified, is beyond all challenge or impeachment, except perhaps by the State, through some appropriate tribunal. (3) But any such inquiry, assuming it can lawfully be made, must be completed before the day for casting the electoral vote arrives. (4) When the electors have cast their votes, and transmitted them to the president of the Senate, their functions are gone forever. The power of the State in the election of a President is then exhausted, her jurisdiction absolutely extinguished. It is not in her power to undo or impair what she has done, either by the action of her Legislature or her courts.

There is a lack of unanimity among the majority of the commission upon the question whether a State could revise the action of its canvassing authority, even before December 6th. Mr. Justice Strong said that if there be any power over the election of electors up to the day when the electors cast their ballots for President, the

State undoubtedly has it. Mr. Justice Bradley seemed to doubt whether any courts could interfere with the course of an election for President and Vice-President.

Greater diversity of sentiment existed among the majority of the commission upon the question of an elector's eligibility. An elector invested with color of office, said Morton, was an elector *de facto*, whose right to vote could not be challenged, even if he belonged to the class upon which the Constitution has laid its prohibition. Frelinghuysen declared the provision of the Constitution not self-executing. Hoar would not rely upon "the doctrine which recognizes as valid in law the acts of public or corporate officers, who, without rightful title, perform the functions of an office with which they are in part clothed." Garfield did not discuss the point. Justice Strong also refused to consider it, because he regarded the Hayes electors as officers *de jure*. Justice Miller's view that the inquiry as to Humphreys' eligibility came too late has been considered. The constitutional provision, in Miller's judgment, was not self-executing, nor had Florida established any tribunal for the trial of questions affecting electors. Justice Bradley, while expressing similar views, said, in his opinion in the Louisiana case, that he was not entirely satisfied with his previous conclusion that "if a disqualified elector casts his vote when disqualified, the objection cannot be taken. . . . But as at present advised, I am inclined to the opinion that, if constitutionally disqualified when he casts his vote, such vote ought not to be counted." All the minority of the commission unanimously held the constitutional prohibition self-executing. The vote of an elector whom the supreme law of the land forbids a State to appoint they considered absolutely void. But what tribunal was to decide the question?

The report of the commission, announcing its decision that the Hayes electors had received the vote of Florida

and were duly appointed electors was made on February 9, 1877. The Houses convened on February 10th, and as objection was made to the decision the Houses then separated. The Senate, by a strict party vote, sustained the commission and decided that the votes given by the Hayes electors should be counted. The decision of the commission was received with disapproval in the House of Representatives, which, on February 12th, by a vote of 168 to 103 (nineteen not voting), decided to count the votes given by the Tilden electors. The vote was a strict party vote, except that one Democrat concurred with the Republicans.

## CHAPTER VII

### THE LOUISIANA CASE

THE views enunciated by a bare majority of the commission in the Florida case plainly foreshadowed their decision upon the returns from Louisiana and South Carolina. From Louisiana there came to the presiding officer of the Senate three sets of returns, and these, with the objections thereto, were referred to the commission.

To understand the case presented to the commission, a brief summary of antecedent events in Louisiana becomes necessary.

The Legislature of Louisiana, in the winter of 1872, abolished the returning or canvassing board created by an act passed in 1870, and authorized the State Senate to elect from all political parties a new board of five persons, to be the returning officers for elections in the State and to have power to make the returns of all elections, a majority to constitute a quorum.

The returning officers were to compile the statements from all polls or voting places at which there should have been a fair, free, and peaceable registration and election. And whenever, from any poll or voting place, there should be received the statement of any supervisor of registration, or commissioner of election, in the form prescribed by the act, based upon the affidavits of three or more citizens, of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influence, preventing or tending to prevent a fair, free, and

peaceable vote of all the qualified electors entitled to vote at such poll or voting place, the returning officers were charged with the duty of investigating the statement, and if upon investigation they should become satisfied that such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influence did materially interfere with the purity and freedom of the election or registration at such polling place, the returning officers were authorized to exclude all the votes from such place from their returns.

This statute, while it conferred extensive judicial powers upon the returning officers,—powers which the Supreme Court of the State had decided to be constitutionally granted,—authorized these returning officers to reject the votes of a poll only when a verified statement, based upon affidavits of at least three citizens, had been forwarded by the supervisor of registrations or the commissioner of elections in the district and when the statement after investigation had been proved correct. The statement was required to be forwarded to the board, together with the returns from the precinct or parish concerned. “Not a single parish,” said one of the Democratic counsel, “sent up any such statement with its return, verified by the affidavit of three persons.” The returning officers had no authority to make the investigation, as Morton had said in the report of the Senate committee of 1873, unless the foundation was first laid by the sworn statements of officers present at the election. On February 23, 1875, a committee of the House of Representatives, of which Hoar, Wheeler, and Frye were members, reported to the House that the powers of the returning board were limited to a canvass and compilation of the returns lawfully made to them by the local officers, except in cases where such returns were accompanied by the certificate of the supervisor or commissioner, provided in the third section of the Act of 1872.



"In such cases, the last sentence of that section shows that it was expected that they [the returning officers] would ordinarily exercise the grave and delicate duty of investigating charges of riot, tumult, bribery, or corruption on a hearing of the parties interested in the office. It never could have been meant that this board, of its own motion, sitting in New Orleans, at a distance from the place of voting, and without notice, could decide the rights of persons claiming to be elected."

On November 16, 1876, the returning officers met in New Orleans to canvass the returns of the recent election. The fifth member of the board, who was a Democrat, resigned immediately after the election, and his four Republican associates declined to fill the vacancy. Against the protests of Democratic leaders the board held its sessions in secret, nor would it allow the United States supervisors to be present or counsel for contestants to watch the counting of returns. Although in four Republican parishes the names of only three electors appeared on the ballots, it treated these ballots as though they bore the names of the eight electors. Its principal changes had been made by counting for all the eight Hayes electors some twelve thousand ballots bearing the names of only three; and by throwing out without even the semblance of a protest about thirteen thousand Democratic and two thousand Republican votes, mainly in the parishes of East Baton Rouge, De Soto, East and West Feliciana, Grant, Iberia, Lafayette, Lafourche, Morehouse, and Ouachita. The fraudulent and illegal action of the returning officers had, Senator McDonald claimed before the Electoral Commission, been proved in the evidence taken by the Senate Committee on Privileges and Elections, in pursuance of a resolution of the Senate, adopted December 4, 1876, and had been established in the testimony taken by a special committee of the House of Representatives. Senator Howe, in his address before

the commission, admitted that the board had rejected the votes, in part or in whole, of twenty-two parishes, but maintained that these votes had been thrown out after satisfactory proof to the returning officers of violence and intimidation. He did not claim, however, that the statutory protests had first been filed. Direct proof of violence or intimidation was wanting in a number of instances; the Republican counsel sought to supply the lack by inference. The great disparity between the registration of white and colored citizens and the actual vote proved conclusively, they said, that colored men had been forbidden to vote or forced to cast their ballots for Democratic electors.

The first of the three sets of returns from Louisiana was nominally correct in form. It was signed by the eight Hayes electors on December 6, 1876, and to it was annexed a certificate of William Pitt Kellogg, then governor of the State, certifying to the election of these electors, of whom he himself was one. Return No. 3, was in effect the same as No. 1. Return No. 2 was signed by the eight Tilden electors and was attested by the certificate, dated December 6, 1876, of John McEnery, who claimed to be the governor of the State. To certificates No. 1 and No. 3, the Democratic counsel registered a long series of objections, in substance as follows: That the State was without a Republican form of government and that Kellogg was not its governor; that there was no law in force in November, 1876, regulating the appointment of presidential electors; that the people had elected the Tilden electors by a majority for each of six thousand and upwards, and that said electors had received a certificate from the lawful governor, McEnery; that the returning board was an unconstitutional body; that the statutes creating it and clothing it with judicial functions conflicted with the Constitution; and that four members of the board, all of one political

party, had no jurisdiction to canvass the votes. It was objected also that these returning officers could not reject the statement of the votes at any poll without the certificate and proofs required by the statute; that no protests sufficient to change the result of the election as shown on the face of the returns had been filed, but that the board had fraudulently rejected votes and changed returns; and that two electors, Levissee and Brewster, were Federal officers on November 7, 1876, the first a commissioner of the United States Circuit Court, and the second a surveyor-general of the land office of the district of Louisiana. It was further objected that the State law forbade the appointment of certain State officers, including the governor, as electors.

To return No. 2 the Republican counsel objected that there was no evidence that any of the so-called Tilden electors had been appointed as the Legislature directed, and that McEnery was not the governor of the State.

At the suggestion of the commission, the Democratic counsel through Trumbull formulated an offer of proof analogous to that made by O'Connor in the Florida case. This offer contained the several matters set up by the Democrats in opposition to certificates numbered 1 and 3; and the discussion proceeded upon this proffer of evidence. In their argument the Democratic counsel not only contended that the two Houses in joint meeting had power to go behind the State returns, but went to the extreme length of insisting that as each House of Congress was the constitutional judge of the election of its own members, the two Houses were judges of the election of presidential electors. In support of a claim hostile to the Constitution, appeal was made to the action of Congress in 1873. Senator McDonald, of Louisiana, urged the commission to consider the evidence that had been taken by the Senate committee and the special committee of the

House, and to find, either upon that evidence or upon any other that the commission decided to receive, whether the Hayes or the Tilden electors had been elected. Representative Jenks, one of the counsel for the Tilden electors, stated that he was prepared to prove that the Tilden electors were elected in the manner prescribed by the statutes of Louisiana, and he dilated upon the fact that votes had been thrown out by the returning board in a number of parishes throughout the State. It was the duty of the commission, said Jenks, to receive the testimony taken by the Senate and the House committees, for the commission was acting "substantially as though it were a congressional body." Matthew H. Carpenter, whose affiliations had formerly been with the Republican party and who had been a member of the Senate committee which reported upon the unconstitutional and unwarrantable action of the returning board of Louisiana, in 1873,<sup>1</sup> argued that four persons styling themselves the returning board of that State had, without the semblance of jurisdiction, rejected ten thousand Tilden votes and declared the Hayes electors elected by about two thousand majority. Starting with the premise that both Houses of Congress had power to count the electoral returns, and that both Houses had repeatedly, through committees, made inquiry into the election processes of the State, the Democratic counsel easily deduced

<sup>1</sup> "I desire to say, in the first place, that I do not appear for Samuel J. Tilden. He is a gentleman whose acquaintance I have not the honor of; with whom I have no sympathy; against whom I voted on the 7th of November last; and if this tribunal could order a new trial, I should vote against him again, believing, as I do, that the accession of the Democratic party to power in this country to-day would be the greatest calamity that could befall the people except one, and that one greater calamity would be to keep him out by fraud and falsehood. I appear here for 10,000 legal voters of Louisiana, who, without accusation or proof, indictment or trial, notice or hearing, have been disfranchised by four villains, incorporated with perpetual succession, whose official title is 'The Returning Board of Louisiana.'"

the possession of such power by the commission. Against the claim that Levissee and Brewster, who were Federal officers on November 7, 1876, had been appointed electors, Carpenter very forcibly said:

“ Every lawyer will concede that a person forbidden by the Constitution to be appointed an elector is equally forbidden by the Constitution to be an elector or to cast a vote for President or Vice-President. . . . The provision of the Constitution strikes at the very root of the matter. . . . In other words, he violates the Constitution by acting and voting in the electoral college.”

Votes cast by such Federal officers he affirmed to be no votes; such should be excluded from the count.

Lyman Trumbull, a former Republican and the famous author of the ironclad twenty-second joint rule, offered to show that Kellogg the elector and Kellogg the governor *de facto* were identical; that the constitution of Louisiana forbade any person to hold more than one office of trust or profit in the State, with the single exception of justices of the peace and notaries public. Pursuing the same line of argument as Carpenter, he claimed that Kellogg had not been elected, but actually had seven thousand less votes than each of the Tilden electors. He pleaded for the exercise by the commission of the power to canvass the vote, which, he urged, had been deposited with the two Houses of Congress, and trenchantly asked: “Is it to turn out that this commission was formed for the mere purpose of doing a sum in arithmetic, of adding up certain figures?” In 1873, said Trumbull, both Houses, as a result of the reports of their investigating committees, decided not to count the electoral vote of Louisiana, although Governor Warmoth had given a certificate in due form. But an inquiry by Commissioner Edmunds elicited the fact that the Senate committee in 1873 had expressed the sound opinion that neither the

Senate nor both Houses jointly "have the power under the Constitution to canvass the returns of an election, and count the votes to determine who have been elected presidential electors, but that the mode and manner of choosing the electors are left exclusively to the States." Trumbull having also argued that the appointment of certain electors was invalid under the constitution of the State of Louisiana, Morton asked the profoundly interesting question whether, inasmuch as the Federal Constitution gives to the Legislature of a State the control of the appointment of electors, it was competent for the State by her constitution to control the Legislature in the exercise of that power. Trumbull answered: "I should say a Legislature is bound to observe the State constitution as well as the Constitution of the United States, unless they conflict."

Shellabarger, one of the ablest lawyers of his day, and an advocate, in 1869, of the power of the president of the Senate to count the votes, made a cogent argument in support of the Republican objections to return No. 2 and against the contentions of the Democratic counsel. The main question, said Shellabarger, is what the commission has just decided regarding Florida: "whether or not it is competent for you to go behind the action of the returning board of Louisiana for the purpose of finding out what happened in its exercise of the jurisdiction vested in it by statute"; and he cited the decision of the Louisiana courts to show that the acts of the returning board were final. The real question had been accurately phrased by Judge Miller—whether, there being a board competent under Louisiana law to make the returns and required by that law to find out, declare and certify who were duly elected to the offices in the State, including the office of presidential electors, the commission had any power to review the board's conclusions. Evarts, in a logical and powerful argument, showed that

the Democrats had shifted their ground. They had at first insisted that the commission had judicial power; and afterwards that it had legislative power,—the power of the two Houses of Congress, in respect to the election of their own members. Evarts maintained that the commission had only the powers vested in the two Houses in the sole matter of counting the votes,—“the powers that the two Houses have in the act and transaction of counting the vote, and no other powers.” The offer of evidence, he argued, included nothing tending to show that either Levissee or Brewster was ineligible on December 6, 1876; nevertheless, assuming them to have been ineligible, “they had been elected, inducted into the office of electors,” and the State could not be stripped of its electoral vote “by extraneous evidence, adduced at the moment of counting the vote, that a man was ineligible.”

During the argument of Judge Campbell, who closed the case for the Tilden electors, an interesting colloquy took place between him and Judge Strong, in which the Democratic and the Republican mind seemed to occupy positions the reverse of those which would naturally be ascribed to them. Judge Strong asked Campbell whether it was within the power of the State to constitute a tribunal to try contests between two sets of electors who claimed under an election.

“Unquestionably,” answered Judge Campbell. “Then,” said Commissioner Strong, “you contend that the power of judging of the honesty or accuracy of the decision of the returning board is in the State.

“CAMPBELL: In case of State officers.

“COMMISSIONER STRONG: I am speaking of electors.

“CAMPBELL: . . . My own opinion is that the State has no jurisdiction over the elector.

“STRONG: Cannot review its own election for electors?

“CAMPBELL: . . . I say that the election is to be reviewed and examined finally by the two Houses of Congress,

when their certificates of returns come. . . . My view of these electors under the Constitution is, that the State is the instrument and the agency, and its laws are instrumental for the purpose of communicating to the two Houses of Congress the election of electors; and the two Houses of Congress, in determining who has a majority of all the electors, necessarily can inquire whether those electors were fairly chosen or not."

The expanding functions of Congress include authority not only to count the electoral votes presented at the joint session of the two Houses, but to descend beneath the certified return from the State, brush aside the determination of the State returning board, and conduct a trial of the question whether electors had actually been elected! This assuredly is far from the old Democratic moorings. Campbell was on safer ground when he added:

"Congress could create a tribunal to inquire into the validity and truthfulness and regularity of any election for electors, for the purpose of determining the question whether the votes cast for President and Vice-President are cast by men competent to do so. It is the only legitimate place where such a tribunal could come from, because the power to be exercised by electors affects every citizen and every interest in the United States; every State in this Union is interested in that decision, and no State would be justified in allowing the determination of such questions finally to rest in a State tribunal."

He closed his argument with a graphic and powerful description of affairs in the State:

"The State is in the possession of an oligarchy of unscrupulous, dishonest, corrupt, overreaching politicians and persons who employ the powers of the State for their own emolument. . . . For years they have usurped the powers of the State by means that have brought upon them the condemnation of the Senate of the United States, of the House of Representa-



tives of the United States, and, I may say, of the whole people of the United States. Those practices have been covered; immunity has been granted to them, because of their intercourse and connection with the politics and parties of the Union; and, without that connection, they would not stand in that State for a single hour. By their association they have prostrated every material and endangered every moral interest within the limits of the State. . . . The rings in Louisiana have affected the peace of this country."

While the history of Louisiana during reconstruction remains to be fully written, there exists little doubt of the truthfulness and accuracy of the indictment formulated and presented to the commission by the Democratic counsel. But a question of greater and more profound interest than the anarchic state of affairs in Louisiana was before the commission, and that question was as to the right of that body or of Congress to revolutionize the Government of the United States by an investigation of an election of presidential electors within a State.

The commission divided, as in the Florida case, by a vote of eight to seven. Morton, in his opinion, said: "An offer is made to impeach the decision of the returning officers of Louisiana by showing that they threw out votes in violation of law, that their rulings were arbitrary and unjust, and that in point of fact the Tilden electors were appointed." He voted in favor of excluding such proofs because the appointment of the Hayes electors was duly certified by the governor of the State, and their appointment by the votes of the people was declared in due form of law by the proper returning officers of the State, who alone were duly authorized to canvass, and determine the persons appointed electors.

"The whole question comes down to this simple proposition: Is it competent for the two Houses of Congress, or for this commission acting in their stead, when counting the elec-

toral votes for President, to go behind the decision made by the officers appointed by the Legislature of the State for the purpose of canvassing and determining the result of the election, to inquire what was the number of votes cast for one set of candidates, or for the other; whether the election was fairly conducted and whether the officers appointed by the State to conduct the election or to determine its results acted within the limits of the law or upon sufficient evidence. A majority of this commission decided in the Florida case that we had no such power, and I believe that time and the good sense of the American people will justify the decision in every respect."

Senator Thurman, on the contrary, in voting for the admission of the evidence, forcibly said:

"I deny that the returning board of Louisiana has any lawful existence. I deny that the constitution of that State, or anything in the Federal Constitution, confers upon her Legislature power to create *such* a board. . . . It is a board consisting of five persons holding their offices without any limitation of time and filling all the vacancies that occur in their own body. It is, therefore, a kind of perpetual, self-preserving, and self-perpetuating corporation. . . . The board is in effect constituted the State—to govern it according to its own arbitrary will and discretion. There is no republican government in Louisiana. There can be no republican government in that State so long as this returning board is upheld. An oligarchy more corrupt, more odious, more anti-republican, never before existed on this globe."

But as there was a semblance of government in the State, and as the courts of the State had sustained the validity of the legislation under which the returning board was organized, Thurman's argument was unsound. And there was a fallacy in his contention that inasmuch as Congress had gone behind the returns in 1873, the commission, armed with like powers, should ignore the determination of the

State board and hear the evidence offered by the Democratic counsel. The evil example of Congress was no guide to a body seeking to follow the Constitution. In fact, the decision of the commission was a severe arraignment of the Republican policy of investigating Southern elections.

Frelinghuysen, who voted with the majority, answering Thurman's objection that the board was not composed of members from all political parties, said: "If the provision that the board must consist of those having different political opinions were constitutional, which I much doubt, the requirement is clearly only directory"; but it was beside the mark to attempt to pass upon the constitutionality of this State legislation.

Bayard argued that the Democratic proofs should be received. There was an offer to prove that four persons only, for two years and upwards, had composed a board which, by the language of the act, was to consist of five persons; and that, although there were eighty-six thousand registered Democratic voters in Louisiana, not one of them had ever been elected to fill the vacancy.

"The case presented for our consideration is whether we will sustain the constitution and the rights of the State of Louisiana under it to have the voice of her people, as proclaimed at the election held on November 7, 1876, hearkened unto and obeyed, or whether we will permit this false personation of the State, a band of infamous men and treacherous officials, to palm off upon the State of Louisiana and upon every State in this Union eight false electoral votes, and by such votes determine the possession of the executive power of this government for the next four years. . . ."

Right or wrong, Bayard was in accord with Hoar, Wheeler, and Frye, when they declared, in their report to the House, in 1875, that the question did not concern the people of Louisiana alone, but that the people of

the United States had "an interest in the question whether Senators and Representatives for Louisiana, thrust into their seats by illegal means, shall sit in Congress to make laws for them, *and whether electors, gaining their office in like manner, shall turn the scale in the choice of a President of the United States.*" Bayard argued also that Levissee and Brewster both held offices of trust and profit under the United States on November 7, 1876, that the Federal Constitution prohibited their appointment, and that the provision of the Constitution was self-enforcing. He described that provision as "a limitation upon the power of the State to do a certain act." Nor did Bayard subscribe to the view that the Constitution of the United States meant to exalt the State Legislature over the State constitution in the appointment of presidential electors.

"I do not hold that the Constitution of the United States contemplated the deposit in the 'Legislature' of a State of the control of the appointment of electors as a body distinct from the State itself, with power to act independently and regardless of the arrangements of the constitution of the State. All power vested in the Legislature of a State is defined and limited by the State constitution, and all laws passed by any State Legislature in violation of the constitution of a State are as absolutely void as if passed in violation of the Constitution of the United States, which is the supreme law of the land. The Legislature of a State being, therefore, merely one department of the State government and clearly subordinate to the will of the State as expressed in its constitution, cannot give validity to any statute which violates the principles of republican government in a State or deprives the people of that State of their rights intended to be secured against encroachment by any of their rulers or officials by the terms of their written constitution and charter of powers."

Eppa Hunton, in commenting upon the features of

the case that distinguished it from the Florida case, said:

“In the first place it is offered to prove that this canvassing board was not legal, because it should have consisted of five whereas it consisted only of four. That these four persistently refused to fill the board, and give the Democrats a representation in said board, and that such refusal was for the purpose of concealing from the opposite party the fraudulent acts of said board by which they gave the returns to the Hayes electors.”

The report of the committee of the House of Representatives declaring the action of the Louisiana returning board in 1873 null and void was acquiesced in by both Houses of Congress, and the electoral vote of Louisiana was rejected by concurrent action on the ground, Hunton said, that the laws of the State had not been complied with in the canvass and return of the votes cast for electors.

According to Commissioner Abbott, there was no legally constituted returning board in Louisiana, with any power to canvass the vote. Commissioner Hoar failed to express any opinion in the Louisiana case other than that indicated by his vote, while Commissioner Garfield considered the conclusion reached by the commission in the Florida case as decisive of the Louisiana case, there being no difference in principle between the two as to the offer of proof. The Louisiana Supreme Court, he asserted, had decided that a board of four persons was the lawful returning board of the State, and the construction given by a State court to the statutes of the State was binding upon Federal tribunals. The Louisiana courts had also upheld the constitutionality of the law creating the board. Louisiana had followed the method prescribed by her Legislature, which had been reviewed by her highest court and declared constitu-

tional. The State possessed the sole authority to determine who were her electors. "Certificate No. 2 comes before us," he said, "with no semblance of authority. . . . It is signed by a man who for three years has not even pretended to be governor." He took sharp issue with Bayard, declaring that, whether the acts of the returning board were in conflict with the constitution of Louisiana or not, they were in accordance with the mode of procedure prescribed by her Legislature; "and the national Constitution confers upon the State Legislature the sole and exclusive authority to prescribe the mode of appointment."

As in the Florida case, neither Commissioner Edmunds nor Commissioner Payne delivered an opinion. Mr. Justice Field wrote no opinion on the Louisiana case, nor did Commissioner Strong, his views having sufficiently appeared in the colloquy between him and Mr. Justice Campbell. Nor did Commissioner Miller take any part in the discussion, because, as he afterwards said, in his opinion in the Oregon case, the Louisiana case was governed by the principles laid down by him in the Florida case and which had received the approval of the commission.

Great interest attaches to the opinion of Mr. Justice Bradley, who has been satirically styled the "fifteenth" member of the commission. Judge Bradley condensed the objections to the first and third return from Louisiana, asserting that the first two objections,—that the State is without a republican form of government, and that Kellogg was not the governor,—had not been seriously urged. The third objection, that there was no law in force in November, 1876, regulating the appointment of electors, which had been strenuously argued by several of the Democratic counsel, turned, said Judge Bradley, upon the question whether the presidential electoral law of 1868 was or was not repealed by the

general election law of 1872; and after reviewing the statutes he declared the earlier law unrepealed, except as to the mode of canvassing the returns, which was to be performed by the returning board created by the act of 1872. He failed, he said, to perceive the unconstitutionality of the law creating the returning board, for he considered that question had been settled by the Louisiana Supreme Court. "The objection that there were only four members constituting the board at the canvass in December last," he said, "is met by the general rule of law in regard to public bodies, that the happening of a vacancy does not destroy the body if a quorum still remain." With the motives that inspired the Republican members to leave the vacancy unfilled, he considered the commission had nothing to do. "The question with which we have to do is a question of power, of legal authority in four members to act. And of this I have no doubt." As to the general charge of fraud in the proceedings of that board, he deemed his views in the Florida case an adequate answer; the commission could not go behind the returns. On two points he declared himself perfectly clear: First, that the two Houses did not constitute a canvassing board for the purpose of investigating and deciding on the results of an election for electors in a State. The proposed act of 1800 carefully excluded any inquiry into the number of votes on which an elector was elected, and it could not well be pretended that the Houses had power to go farther into the inquiry than was proposed by that bill. Secondly, they did not constitute a tribunal or court for trying the validity of election returns and sitting in judgment on the legality of the proceedings in the course of the election. Nevertheless, Congress had in previous years usurped this power, and one of the strongest pleas made by the Democratic counsel was that the commission should follow the course of Congress. The following quota-

tions from Judge Bradley's opinion are profoundly interesting:

"Whether the legislative power of the Government might not, by law, make provision for an investigation into frauds and illegalities, I do not undertake to decide. It cannot be done, in my judgment, by any agency of the Federal Government without legislative regulation. The necessity of an orderly mode of taking evidence and giving opportunity to cross-examine witnesses would require the interposition of law. The ordinary power of the two Houses as legislative bodies, by which they investigate facts through the agency of committees, is illy adapted to such an inquiry. It seems to me, however, the better conclusion, that the jurisdiction of the whole matter belongs exclusively to the States. Let them take care to protect themselves from the perpetration of frauds. They need no guardians. They are able, and better able than Congress, to create every kind of political machinery which human prudence can contrive, for circumventing fraud, and preserving their true voice and vote in the presidential election."

His decision, therefore, was for the rejection of the evidence.

Judge Bradley declared that the alleged ineligibility under State laws was a matter beyond the pale of consideration by the commission. He further said:

"Two of the electors, however, Levissee and Brewster, are alleged to have held offices of trust and profit under the United States, when the election was held on the 7th of November. It is not alleged that they did so on the 6th of December, when they gave their votes. Being absent when the electoral college met, their places were declared vacant, and the college itself proceeded to reappoint them under the law, and sent for them. They then appeared and took their seats. So that, in point of fact, the objection does not meet the case, unless their being Federal office-holders at the time of the election affects it.



“ Though not necessary to the decision of this case, I have re-examined the question of constitutional ineligibility since the Florida case was disposed of, and must say that I am not entirely satisfied with the conclusion to which I then came, namely, that if a disqualified elector casts his vote when disqualified, the objection cannot be taken. I still think that this disqualification at the time of his election is not material, if such disqualification ceases before he acts as an elector. But, as at present advised, I am inclined to the opinion that if constitutionally disqualified when he casts his vote, such vote ought not to be counted.

“ I still think, as I thought in discussing the Florida case, that the form of the constitutional prohibition is not material; that it is all one, whether the prohibition is that a Federal officer shall not *be* an elector, or that he shall not be *appointed* an elector. The spirit and object of the prohibition is to make office-holding under the Federal Government a disqualification. That is all. And this is the more apparent when we recollect the reasons for it. When the Constitution was framed, the great object of creating the office of electors to elect the President and Vice-President was to remove this great duty as far as possible from the influence of popular passion and prejudice, and to place it in the hands of men of wisdom and discretion, having a knowledge of public affairs and public men. The idea was that they were to act with freedom and independence. The jealousy which was manifested in the convention against the apprehended influence and power of the General Government, and especially of the legislative branch, induced the prohibition in question. It was feared that the members of the Houses of Congress and persons holding office under the Government would be peculiarly subject to these influences in exercising the power of voting for chief magistrate. It was not in the process of appointment that this influence was dreaded; but in the effect it would have on the elector himself in giving his vote.

“ It seems to me, therefore, that if a person appointed an elector has no official connection with the Federal Government when he gives his vote, such vote cannot be justly excepted

to. And that substantial effect is given to the constitutional disqualification if the electoral vote given by such officer is rejected. And my present impression is that it should be rejected.

"Circumstances, it is true, have greatly changed since the Constitution was adopted. Instead of electors being, as it was supposed they would be, invested with power to act on the dictates of their own judgment and discretion in choosing a President, they have come to be mere puppets, elected to express the pre-ordained will of the political party that elects them. The matter of ineligibility has come to be really a matter of no importance, except as it still stands in the Constitution, and is to be interpreted as it was understood when the Constitution was adopted. Hence we must ascertain, if we can, what was its original design and meaning, without attempting to stretch or enlarge its force."

Mr. Justice Clifford, the president of the commission, believing further discussion useless, rendered no opinion either in the Louisiana or the Oregon case.

The commission, on February 16, 1877, by a vote of eight to seven, decided that evidence that the returning board was unconstitutional and its acts null and void was inadmissible, and that an offer to prove that it was illegally constituted or possessed of no jurisdiction should also be rejected. It declined to receive testimony showing that frauds had been committed in the returns or that the votes cast had never been canvassed by the returning board, and also refused to receive evidence tending to prove the ineligibility of any of the electors, the vote upon each proposition being eight to seven. It upheld the doctrine announced in the Florida case, that it had no jurisdiction to go behind the determination of the State returning officers.

Mr. Justice Bradley alone, of the majority of the commission, expressed any opinion upon the alleged ineligibility of Levissee or Brewster. Neither Morton,

Frelinghuysen, nor Garfield, the only others of the majority who wrote opinions in the Louisiana case, alluded to the subject; whereas all of the minority members who wrote agreed that the testimony as to ineligibility should be received. Thurman declared that the Constitution of the United States made such officers ineligible not merely to hold an office or trust, but to be appointed to the office or trust. Nor did his perusal of the Louisiana statutes reveal to him the source of the power exercised by the other electors to fill vacancies in the college. Bayard, after reviewing at length the provisions of the Louisiana statutes, reached the conclusion that "no statute exists authorizing the filling of a vacancy in the office of elector"; and, even were there such a statute, there were no vacancies, as the men were ineligible, and their attempted appointment utterly void. Hunton coincided with Thurman and Bayard and quoted extensively from that part of Carpenter's address in which the latter urged that, in any event, the votes of these two Hayes electors must be rejected. It is difficult to explain the extraordinary divergence of opinion between the Democratic and the Republican commissioners, all men of disciplined faculties and trained in the investigation and analysis of facts; it, indeed, shows, as Judge Bradley said, that "the passage of some law regulating the matter is on all accounts desirable." The Louisiana case, like the Florida case, illustrates the folly as well as the danger of entrusting the decision of a contested presidential election to any tribunal, however wise or impartial it is assumed to be, which is not governed and controlled by positive statutory regulations prescribed in advance. There was no existing law to govern the count; and, as Mr. Blaine well said, in his *Twenty Years of Congress*, it is in the nature of things impossible, to constitute, after an election, a commission whose decision will be accepted by

both political organizations as impartial. The decisions of such a commission can hardly be impartial. The decision of the commission that the certificates of the Hayes electors were the true vote of Louisiana was reported to the two Houses and the electoral count was resumed by them on February 19th. Upon objection to the decision, the two Houses separated. The Senate, by a vote of 41 to 28, sustained the decision, but the House—173 to 99 (18 not voting)—voted that the electoral votes cast by the Hayes electors ought not to be counted. As in the case of Florida, the vote in each House was a strict party one, save that two Republicans in the House of Representatives voted with the Democrats.

## CHAPTER VIII

### THE OREGON CASE—THE SOUTH CAROLINA CASE

THE Oregon count was reached in the joint session of the two Houses on February 21st, and at once referred to the commission.

The essential question presented by the Florida and the Louisiana returns was whether the Electoral Commission or the Houses of Congress had the power to go behind the determination of the highest returning board of the State. The decision of the majority of the commission was that the determination of a State returning board was unimpeachable and that any attempt to inquire into the facts certified by it was beyond the competency of the commission or Congress. Such an inquiry would be an impertinence,—a trespass upon the prerogatives of the State. Incidentally the question of the eligibility of electors was considered. The Oregon case presented this same question, but in a different form. Here the issue was sharply raised and exhaustively debated whether the Constitution of the United States did not so absolutely forbid the appointment of an elector who was a Federal officer as to render every stage of the proceedings culminating in his appointment null and void. If the appointment was void *ab initio*, it was argued that no vacancy whatever existed to be filled by the electors who had been legally appointed, because an office which never had an incumbent could not become vacant by the pretended resignation or refusal to act of one who had no title as elector.

The principles controlling the decision of the bare majority of the commission in the two earlier cases are lucidly stated in the argument of Richard T. Merrick, one of the counsel for Mr. Tilden in the Oregon case.

“ You go behind the certificate [of the governor] . . . until you find some authentication of the fact with reference to which you are inquiring, made under the authority and by virtue of a power in the State herself. When, in the case of Florida and Louisiana, you passed by the certificate of the governor, given in obedience to the act of Congress, and found yourselves confronted with the results of a returning board, you said: ‘ Here we must stop, for here the State has challenged Federal power, and bade it take no further step in invading the State and the matters of self-government.’ It was not the result of the canvass; it was not any virtue in the board; it was not because of any sanctity in Wells or Casanave or their associates, but it was because when you reached them you reached the broad seal of the State, affixed as evidence to a State fact, under State law, and by State authority. . . . The Federal Government, speaking, as I understand your decisions, through the adjudications of this tribunal, has said that as the appointment of the electors is an office given to the States by special grant of power, . . . as the appointment of the electors is a power in the States, and the States are required to exercise that power, when they have done so, we will go no further into the inquiry as to the propriety of State action than the solemn and great seal of the State, whenever we find it affixed to the ultimate fact under the authority of State law, and by the sanction of the State organization.”

Evarts had previously addressed the commission in similar strain, the difference being that Merrick clearly sums up the decision reached by that body, while Evarts states it as the thesis successfully maintained by the Hayes counsel.

“ We laid down the proposition that the ultimate fact under

the laws of the State in completion of the election by the certification of boards or officers charged with the completion of the final canvass was a point beyond which, in looking into the transactions of the State, the Federal Government could not go. We laid down at the same time the further proposition that this conclusion of the State's action was the principal fact that, under the legislation of Congress, was made the subject of *any* lawful certification, and that, as that principal fact could not be overreached by any previous inquiry into the transaction of the State, so that principal fact could not be disparaged or falsified by any congressional authority exercised in certification of that fact.

"The proposition [continued Mr. Evarts], as we then laid it down for Florida, we adhered to in the case of Louisiana, and . . . we adhere to in the case of Oregon. We find in Oregon, as in Florida or Louisiana, that by its laws there is some final ministerial canvass, which, completed, shows what the election was; and we need only to look into the laws of this State, as of the other States, to see whether the apparent canvassing board was one that had such authority under the laws of the State."

In the Oregon case there was no dispute as to the facts. No one denied that the three Hayes electors had a plurality of the popular vote. The crux of the controversy was whether J. W. Watts, who received more than a thousand majority over his highest Democratic competitor, but who at the time of the November election, as was shown by the testimony taken before the commission, was postmaster in the town of La Fayette, in that State (which office he resigned on November 13th, his resignation being immediately accepted by the Postmaster-General), was, under the Constitution of the United States, eligible either to be voted for at the popular election or to be appointed an elector. The Secretary of the State of Oregon, who, according to the decision of a majority of the commission, constituted the sole canvassing

authority of the State on December 6, 1876, canvassed the vote for presidential electors in the presence of the governor and prepared a tabulated statement of the returns from the various counties, which he placed on file in his office, as a complete and lawful canvass showing that Watts, Odell, and Cartwright had been appointed electors for the State of Oregon. All this appeared by an official certificate under the seal of the State, signed by him and delivered by him to the Hayes electors and forwarded by them to the president of the Senate, with their votes. On the morning of December 6th the governor of the State issued three certificates, in each of which he stated that Odell and Cartwright, together with E. A. Cronin, were the three eligible persons receiving the highest number of votes, and that they were duly appointed electors. Cronin received these certificates from the governor and, after communicating their contents to Odell, Cartwright, and Watts, upon their refusal to recognize him as an elector, appointed two persons to act as electors, instead of Odell and Cartwright, and these three voted, Cronin for Tilden and the remaining two for Hayes. The governor refused to give Watts a certificate of election because he deemed Watts ineligible, but the Secretary of State, as the State canvassing officer, having issued a certificate to Odell, Cartwright, and Watts, they met together as an electoral college on December 6th. Watts resigned the office of elector, but was immediately elected by his two associates to fill the so-called vacancy created by his resignation, and the three thereupon cast the vote of the State for Hayes for President and Wheeler for Vice-President.

Two antagonistic certificates or returns came to the two Houses of Congress in joint session. The first was signed by Odell, Watts, and Cartwright, and to it were appended the certificate of the Secretary of State and the tabular list or abstract of the votes cast at the election on



November 7th, for presidential electors, conclusively showing that they each received the highest number of votes in the State. The second return was signed by Cronin, a Democrat, and his associates, Miller and Parker, Republicans, as electors, and was certified by the governor of the State. Under the Electoral Commission law, there being two conflicting returns, the case was referred to the Electoral Commission.

The laws of Oregon did not provide for a board of State canvassers, but directed the Secretary of State, in the presence of the governor, to proceed, within thirty days after an election, to canvass the votes given for State officers and members of Congress, and it directed, with regard to presidential electors, that the votes for electors should be canvassed in the same manner as those for members of Congress. It then provided that the Secretary of State should prepare two lists of the names of the electors elected and affix the seal of the State to the same, and that the lists signed by the governor and the secretary should be transmitted to the college of electors at the hour of their meeting on the first Wednesday of December. The Oregon statute further provided: "If there shall be any vacancy in the office of an elector occasioned by death, refusal to act, neglect to attend, or otherwise, the electors present shall immediately proceed to fill by *viva voce* and plurality of votes such vacancy in the electoral college."

The charges of fraud and intimidation in Florida and Louisiana were never fully proved. Opinions may differ as to whether the action of the board of canvassers of either of those States was in accordance with the true and honest vote of the people of the State. But the indisputable fact in the case of Oregon was that Watts was the choice of a majority of the voters. The substitution of Cronin, who received a minority vote, as an elector in Watts' place, would have defeated the will of the

people. The claim was seriously argued by some of the Democratic counsel that the vote for Watts was void because of his ineligibility, and that Cronin, the next highest candidate, was for that reason chosen an elector. It is to the honor of the Democratic members of the Electoral Commission that they declined to adopt this view. As was well said by Commissioner Bayard: "The underlying theory of our republican rule is the residence of power in the majority. That minority candidates should fill places by popular election is contrary to our American theory, although sometimes, by constitutional arrangements, such a result is reached." The Democrats upon the commission were unwilling to vote to seat a minority candidate because of the ineligibility of his opponent, in the absence of express provision in the law of the State compelling them to do so.

The reasoning upon which the Republican counsel predicated their arguments for the acceptance of the return signed by the Hayes electors was briefly that, under the statutes of Oregon, the Secretary of the State was the final canvassing officer, whose functions were those of the State canvassing board in Florida and Louisiana; that his decision was conclusive as to the result of the State election, and showed that the three Hayes electors had a majority of the popular vote; that the governor of the State had no jurisdiction to pass upon the question of Watts' ineligibility and no lawful right to withhold from the three Hayes electors the certificate required by the Act of 1792; that the governor's certificate was not essential to complete the "appointment" of electors; that the certificate was a statutory and not a constitutional requirement; that the certificate was impeachable; that Cronin was a minority candidate; that the governor could not, by delivering him a certificate, defeat the popular will; and that, whatever might be the correct theory as to Watts' position, the rules of law would not

make a defeated candidate the successful one, even if his adversary were ineligible to office. The argument as far as this point seems impregnable, and the last of these contentions, namely, that the ineligibility of a candidate having the highest vote would not elect one who had a smaller vote, was accepted by all the members of the Electoral Commission. This is the only proposition upon which they were unanimous.

But if Watts were ineligible, and Cronin were not elected, only two of the three electors to whom Oregon was entitled would have been seated in the electoral college. Hence it was necessary for the Republicans to establish that the fact that Watts held the postmastership on November 7th was unimportant. Here arguments diverged into several paths.

Watts had unquestionably resigned his office and his resignation had been accepted before the day when the electors assembled to vote for President and Vice-President, and this resignation, it was argued, created a "vacancy" in the electoral college which his two associates could fill, and which was actually filled on December 6th, by their electing Watts himself to the place made vacant by his resignation. The law of Oregon, counsel said, authorized them to fill the vacancy, and when Watts was selected by Odell and Cartwright he was no longer ineligible, as he had ceased to be postmaster. The language of the Oregon statute was:

"The electors of President and Vice-President shall convene at the seat of government on the first Wednesday of December next after their election, at the hour of twelve of the clock at noon of that day, and if there shall be any vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend, or otherwise, the electors present shall immediately proceed to fill, by *viva voce*, and plurality of votes, such vacancy in the electoral college, and when all the electors shall appear, or the vacan-

cies, if any, shall have been filled as above provided, such electors shall proceed to perform the duties required of them by the Constitution and laws of the United States."

Another line of argument by which Watts' title was supported was that the people of Oregon had voted for him without knowledge of his ineligibility; that the highest canvassing official of the State (the Secretary of State) had given him a certificate of election; that he thereby became a *de facto* if not also a *de jure* elector; that neither the laws of the United States nor of the State ordained any tribunal to try the question of his title to office, and that he was therefore legally appointed.

The Democratic lawyers controverted both of these positions, dwelling with emphasis upon the express language of the Federal Constitution which forbade the appointment as an elector of any person holding an office of trust or profit under the United States Government, a provision they declared to be self-executing, rendering Watts' appointment null and void. And they further argued with great cogency that, if Watts was ineligible when voted for on November 7th, there was, within the meaning of the Oregon statute, no vacancy whatever in the electoral office on December 6th, because a person who was ineligible could not resign an office he never held and thereby create a vacancy; and they quoted, among other authorities, the language of Lord Chief Justice Cockburn that "a man cannot resign that which he is not entitled to and which he has no right to occupy." Merrick, in particular, commented upon the terms "vacancy", "occasioned." Not any vacancy *existing*, but a vacancy occasioned. Apart from the rule "*noscitur a sociis*," which the Republicans contended was too narrow and technical, he argued that any vacancy might have been meant if the phrase commencing with the word "occasioned" had been omitted altogether. To

the argument that Watts was *de facto* if not *de jure* an elector, having been so declared by the State canvassing authority (the Secretary of State, according to the Republican counsel), the Democratic counsel retorted that both the governor and secretary were the State canvassing board, that Cronin held their certificate, and was therefore *de facto* an elector. The governor, they contended, would have violated his oath of office had he given a certificate to an ineligible elector.

The commission, by the usual vote of eight to seven, upheld the certificate emanating from the Secretary of State, declaring that Odell, Cartwright, and Watts had the highest votes, and it therefore gave the three electoral votes of the State to Hayes and Wheeler. Unquestionably the commission was right in holding that the governor's certificate was not conclusive. Merrick had said that "when the bark of the counsel on the other side was tossed against the Scylla of Florida, the pilot looked ahead to the Charybdis that threatened peril in Oregon," and had added that "adroitly as he may have led on his way, if this commission adhere to the course to which the helm was set to shun the reefs of Florida, the bark must be wrecked on those of Oregon." In the Florida case the commission decided, he said, that it was not competent, under the Constitution and the law as it existed when the commission was created,

"to go into evidence *aliunde* the papers opened by the president of the Senate in the presence of the two Houses, to prove that other persons than those regularly certified to by the governor of the State of Florida on, and according to, the determination and declaration of their appointment by the board of State canvassers of said State prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not."

In the Louisiana case, continued Merrick, these identical

words were repeated in the decision. He himself admitted that the governor's certificate was not unimpeachable, for that was not given in the discharge of a State duty confided to him by State law, but in response to an act of Congress which was simply a Federal request. But he argued that the governor's certificate was conclusive evidence of title, unless impeached by a judicial proceeding.

"Suppose that the governor issues his certificate, what is the effect of that certificate when issued? When he has exercised his power, and issued his certificate, and affixed the seal of the State to the certificate, that certificate, so accompanied by the seal, is conclusive evidence of the title and cannot be questioned except in a regular legal proceeding for the purpose of invalidating the commission. Such was the decision of the court of last resort in Massachusetts upon questions submitted to it by the executive department of the government."

Nor are the opinions of the majority of the commission entirely satisfactory. Morton held that if Watts was eligible on the 6th of December when the electoral college voted, having previously resigned his office of postmaster, it was of no importance that he had been postmaster when voted for in November. Falling back upon the views expressed by him in the Florida and in the Louisiana case, he considered Watts' title good *de facto* and *de jure*, but said that as the college of electors was expressly authorized by law to fill "any vacancy in the office of an elector, occasioned by death, refusal to act, neglect to attend or otherwise," the vacancy created by Watts' resignation had been filled by his appointment by Odell and Cartwright, at a time when his disqualification had ceased. He construed the word "otherwise" as broad enough to cover vacancies *ab initio*, or cases where there had been no appointment. He declared the

Secretary of State the sole canvassing authority under the laws of Oregon.

"When the secretary has canvassed, certified, and returned the votes of electors to his office, their appointment is complete. All that the governor has to do with the matter thereafter under the statute is purely ministerial. He has no judicial power upon the subject. He has no discretion whatever reposed in him by the law."

His failure to give the certificate required by the Act of 1792 was of no moment. The certificate he gave to Cronin could not stand against the facts as certified by the highest authority of the State.

"The question of eligibility of electors belongs to the States, and if it is disregarded by the States, there is no way, when the votes are counted in the presence of the two Houses or by this commission, to try and settle such questions. . . . There are few provisions of the Constitution that are self-executing and clearly this is not one. . . . The very highest interests of society require that the validity of official acts shall not be disturbed because of the ineligibility of the persons performing them to hold office. And the reasons for this doctrine apply as strongly in this case as in any other. If the vote of an elector can be stricken out by a subsequent decision that he was ineligible, the evil is without remedy; the State has lost the vote and the spirit of the Constitution has been violated."

There is, I think, no such war between the spirit and the letter of the Constitution, and the express provision is that no State shall appoint, etc. If a State, in defiance of the supreme law of the land, elect a man to an office which the Constitution of the United States explicitly declares he shall not fill, the fault is her own and the punishment of the loss of the electoral vote should follow.

Frelinghuysen put his decision on the ground that the

canvass of the Secretary of State was the final determination and that Watts' resignation caused a vacancy which was properly filled. Neither Hoar nor Garfield nor Payne nor Edmunds filed opinions.

Justice Strong's views were ably expressed.

"I still think, as I thought when we had the Florida and Louisiana cases under consideration, that when the laws of a State have appointed a tribunal, either a board, a council, an officer, or any authority to ascertain, decide, or determine what have been the results of an election for presidential electors, the decision of that board, officer, or authority is conclusive, so long as it remains unreversed by a judicial tribunal empowered by State law to reverse it."

The right of a person claiming to be elected is to be tested, he declared, by the results of the State canvass, not by what either preceded or followed that canvass. The law of Oregon, said the justice, makes the Secretary of State the sole canvassing officer, and the governor of Oregon has no authority to canvass the returns of votes for presidential electors. His unauthorized certificate was the sole foundation for the claim made by the Tilden electors. "I said distinctly more than once, when remarking upon the Florida case, the governor's certificate is not unimpeachable." But to say that the certificate may not be unimpeachable does not meet Merrick's point that there existed no tribunal to test its validity. To paraphrase Morton in order to put his assertion interrogatively: When the votes are counted in the presence of the two Houses is there any way to try and settle the question whether an executive certificate is true or false?

The learned justice's reasoning upon the subject of Watts' ineligibility is not convincing: "I believe that neither this commission nor Congress has any power under the Constitution to judge of the qualifications of a State elector, no more than we have to judge of



State elections and returns." The fallacy of this argument is that the State upon which a prohibition is laid becomes the judge of its own obedience. But whatever the doubtful powers of the commission or Congress, surely within the Federal Government there must reside authority to annul a vote by an ineligible elector. Judge Strong also argued that if Watts was ineligible on the day of his election, his disqualification for appointment ceased on the 14th of November.

"Concede, for the sake of argument, he was ineligible on the 7th of November, and, therefore, was not elected, though he received a higher number of votes than any competitor, then there were two chosen and the college, consisting of three, was not full. One elector was wanting. There was a vacancy, and that vacancy was filled on December 6th, by the action of the two electors who were chosen, who then appointed Watts to fill it."

The notion that a vacancy can exist only when an office has had an incumbent, he characterized as technical! The language of the Oregon statute was very comprehensive; it covered vacancies occasioned in specified ways and "otherwise."

Mr. Justice Miller adhered to the view he expressed in the Florida case, that the fact that an elector held an office of trust or profit under the United States at the date of his election did not render that election void. "I concede, as I did then, that his title to the office could have been avoided if there had been any tribunal competent to try the question of his ineligibility, and it had been so tried and found before he gave his vote for President and Vice-President." The governor of the State was not such a tribunal, and had no authority to pass upon the case.

"If [continued Justice Miller] Watts' election was not

void, his subsequent resignation and failure to attend made a vacancy in the electoral college, which the other members were by statute authorized to fill, and his appointment by them to fill that vacancy was valid, because he had then ceased to hold the office of postmaster."

The wilful refusal of the governor to sign a certificate "is not sufficient to nullify everything else that was done, and make it of no effect. No such force has been attributed to it in the other cases, and I do not see how it can be so here."

Mr. Justice Bradley was of the view that the Secretary of State was the highest canvassing authority in the State, and that his certificate was equivalent to the return of the State canvassing board in Florida or Louisiana. The governor's action in attempting to disregard the canvass and to reject an elector whom he believed ineligible was a clear act of usurpation. The certificate given by the governor to Cronin was *prima facie* evidence,

"but no person has contended that it cannot be contradicted and shown to be untrue, especially by evidence of equal dignity. We did not so decide in the other cases. We held that the final decision of the canvass by the tribunal or authority constituted for that purpose could not be revoked by the two Houses of Congress, by going into evidence behind their action and return."

Upon the subject of Watts' ineligibility, Bradley said: "It is agreed by a large majority of the commission that Cronin was not elected. Some of this majority take the ground that Watts was duly elected, whatever effect his ineligibility, had it continued, might have had on his vote. Others take the ground that there was no election of a third elector." In either case, said Bradley, there was a vacancy. The broad language of the Oregon statute provided for every supposable case of a vacancy in the office of elector.

The Democratic members of the commission did not agree with Mr. Tilden's counsel that a minority candidate was elected when his opponent was ineligible. In their judgment the board consisted of both the secretary and the governor and both had certified to the election of Cronin, Miller, and Parker. But it was of much less moment to determine where the Oregon statute had placed the power—although that was important—than to determine whether an elector ineligible under the Constitution could nevertheless vote. The opinions of the Democratic commissioners in regard to the effect of the choice of an ineligible elector are clear, able, consistent, eloquent.

Said Bayard :

"I have not yet been able to comprehend the force of the argument that the provisions of the Constitution prohibiting the appointment as electors of certain official classes can be held self-executing on the 6th of December, but not self-executing on the 7th of November; and this in the teeth of the plain words affixing the disqualification upon the person and the limitation upon the power of the State."

The failure of the people of Oregon to elect an eligible elector did not create a vacancy. Watts' resignation was in opposition to the plain mandate of the Constitution that *he should not be appointed*; consequently he could not resign an office he never held, nor by any act of his could he create a vacancy in such office. Senator Bayard also paid this tribute to Governor Grover, whom Merrick styled "the much-abused executive," whose motives in issuing the certificate to Cronin had been assailed :

"The very able arguments which we have heard upon this subject, and the elaborate briefs submitted for our instruction, if they are not adequate to control us in the adoption of the

view taken by Governor Grover in this case, are more than sufficient to place his action upon a high plane of conscientious discretion, which lifts him to a level with as sound and reputable jurists as have adorned the bench of England or of the United States."

It was the decision of Bayard, as of his Democratic associates on the commission, that but two votes of the State of Oregon should be counted,—the votes of Odell and Cartwright, Hayes electors.

Hunton also took the stand that the vote cast by the Cronin college was not the constitutional vote of Oregon; that Watts was ineligible and his resignation did not create a vacancy. Abbott, who coincided in these views, put the prohibition of the Federal Constitution in a strong light when he said:

"The Constitution must be construed as saying in terms to the people of Oregon, 'You shall not vote for J. W. Watts.' It, in effect, so says to the people of any State in reference to any candidate who holds an office of trust or profit under the United States. To claim that this prohibition upon the States is left to them, . . . and to them only, to enforce, is against all logic and reason."

Equally forcible was Abbott's analysis of the Oregon law providing for the filling of vacancies in the electoral college. A vacancy could happen only when the office had once been occupied. The phraseology shows this clearly, and the words "or otherwise," applying the accepted canon of construction embodied in the Latin maxim "*noscitur a sociis*," import a vacancy for analogous causes. Mr. Justice Field urged the point with impressiveness and eloquence. "The prohibition" [of the Constitution]

"is unqualified and absolute. All the power of appointment possessed by the State comes from the Constitution. The

office of elector is created by that instrument. Her power of selection is, therefore, necessarily limited by its terms; and from her choice the class designated is excluded. The object of the exclusion was to prevent the use of the patronage of the Government to prolong the official life of those in power."

The clause, he argued, operated by its own force. Like the prohibition against passing an *ex post facto* law or a bill of attainder, or a law impairing the obligation of contracts, it executes itself; it requires no legislation to carry it into effect. He distinguished the case of an elector from that of a Representative or Senator. The clause of the Constitution declaring that "no person *shall* be a Representative who shall not have attained to the age of twenty-five years," and the clause that "no person *shall* be a Senator who shall not have attained to the age of thirty years," do not forbid an election of persons thus disqualified; they only prohibit them from holding the office so long as the disqualification exists.

"They can take the office whenever that ceases. But with respect to electors the case is different; there is an incapacity on the part of the State to appoint as electors certain classes of officers. This distinction between ineligibility to an office and disqualification to hold the office is well marked. The one has reference to the time of election or appointment; the other to the time of taking possession of the office. . . . If, therefore, at the time of the election, persons are within the classes designated, their appointment is impossible. . . . One clause of the same section cannot be disregarded any more than the other, and surely the appointment of a greater number of electors than the State was entitled to have would be a vain proceeding."

Replying to those who argued that the governor's refusal of a certificate to Watts was an act of usurpation, an assumption of judicial functions, Justice Field declared that the governor was bound by the Constitution and his

oath of office to decline the certificate, and he ridiculed the opposing contention that it was that official's duty to issue his certificate of election to any one who might obtain, according to the determination of the canvassers, the highest number of votes, however ineligible the person and however imperative the prohibition against his taking the office.

"To test this doctrine, I put this question to these gentlemen: Supposing the law declared that only white persons should be eligible to an office, and the highest number of votes, according to the canvassers, should be cast for a colored man, would the governor be bound to issue a commission to him? The gentlemen answered that he would be thus bound; that the governor could not in such case decide the question of the colored man's ineligibility. Mr. Senator Thurman put this further question: Supposing the law of the State declared that only males should be elected to an office, and the highest number of votes were cast, according to the report of the canvassers, for a female, would the governor be bound to issue a commission to her? The gentlemen replied as before, that he would be thus bound; that the governor could not determine the ineligibility of the party on the ground of her sex. There is something refreshing in these days of sham and pretence to find men who will thus accept the logic of their principles to whatever result they may lead."

Mr. Justice Field would not vote that Cronin, the candidate having the next highest number of votes to Watts, "was duly appointed," for he was a minority candidate.

The commission, by a unanimous vote, decided that the certificate signed by Cronin, Miller, and Parker, purporting to cast the electoral vote of the State of Oregon, did not contain or certify the constitutional vote to which said State was entitled; but, by a vote of eight to seven, decided that Odell, Cartwright, and Watts, the persons named as electors in certificate No. 1, were the

lawful electors of the State of Oregon, and that their votes were the votes provided for by the Constitution of the United States, and should be counted for President and Vice-President of the United States. This decision was communicated to the two Houses on February 23, 1877; objection was made to it, the Houses again went through the formality of separating to consider the decision, and the Senate voted for its acceptance, the House for its rejection. The Senate vote was 41 yeas to 24 nays; the House vote, which was upon the resolution that the vote given by Watts should not be counted, was 151 yeas to 106 nays.

#### SOUTH CAROLINA

Two certificates had been transmitted from South Carolina to the president of the Senate; one, signed by Governor Chamberlain under the seal of the State, with the return of the seven Hayes electors attached; the other, signed by the seven Tilden electors, setting forth their claim that they had been duly appointed electors of the State of South Carolina, elected by general ticket, and had received the highest number of votes at the popular election of 1876. The certificate further stated that the State board of canvassers, after a pretended canvass of the returns, had illegally declared the Hayes electors elected; that the Tilden electors had instituted *quo warranto* proceedings in the Supreme Court of the State to try their title to the electoral office; that the proceeding was still pending undetermined; that they had made demand upon the Secretary of State of South Carolina for the lists required by law and that their demand had been refused.

Objections were made in the joint session of the two Houses to each certificate. The Democratic objections to the certificate attesting the election of the Hayes electors were, first, that no legal election was held in the

State for presidential electors, inasmuch as the General Assembly of the State had not provided, as required by statute, for the registration of persons entitled to vote; secondly, that there was no republican form of government, such as is guaranteed by the Constitution to every State in the Union, in existence in South Carolina at the time of the election; thirdly, that the Federal army was used to prevent, and that it actually did prevent, a legal or free election; fourthly, that deputy marshals of the United States, over one thousand in number, so interfered with the election that a full and free exercise of the right of suffrage was impossible; and, lastly, that there was not, at the time, any State government in the State. Objections were filed by Republican Senators and Representatives to the Tilden lists as lacking the governor's certificate, and on the ground that the Hayes electors were the actual electors entitled to cast the vote of the State. Under the Electoral Commission law the certificates and objections were referred to the commission, which met for their consideration on February 23, 1877, and reported its decision to the two Houses on the evening of the same day. It was not urged before the commission that the votes of the Tilden electors should be counted, for the Hayes electors had undoubtedly received a majority of the votes cast. The effort of Representatives Hurd and Hurlbut, who appeared for the objectors to certificate No. 1, was to establish that South Carolina had not a republican form of government and that the violation by the Legislature of the provision of the State constitution requiring the passage of a State registration law nullified the entire vote of the State, while the presence of Federal soldiers prevented a fair suffrage. The commission, by a vote of eight to seven, declined to receive the evidence proffered in support of these objections. The objection that the government of the State was not republican in form, inasmuch as the State was



recognized as a member of the Union by the executive department of the Government and by the national legislature through the presence of its Senators and Representatives in the national Congress, could hardly have been urged with confidence that it would appeal to a tribunal that had in all its previous decisions divided along political lines. The one question of abiding interest raised in the South Carolina case, was whether, on all matters relating to the appointment of electors, the Legislature of a State, deriving its authority from the Constitution of the United States, is beyond and above the constitution of the State. The objectors argued that the South Carolina constitution made a registration law an essential prerequisite to a valid election, but it was answered by Representative Lawrence, on behalf of the Hayes electors, that a failure by the Legislature of the State to comply with the provisions of the State constitution could not defeat the duty imposed on the State by the "higher law" of the supreme national Constitution, or disfranchise a State in the election of a President. There is nothing new, said Lawrence, in the suggestion that a State constitution may, in some of its provisions, be unconstitutional and void because in conflict with the Constitution of the United States. Mr. Justice Story, in the Massachusetts Constitutional Convention of 1820, denied the right of any State to insert in its constitution "a provision which controls or destroys a discretion which may be, nay, *must be, exercised by the Legislature, in virtue of powers confided to it by the Constitution of the United States.*"

Morton, Frelinghuysen, and Bradley were the only Republican commissioners who delivered opinions in the South Carolina case. Morton said that, whatever might be the legal effect of the absence of a registry law upon the election of State officers, it would be absurd to pretend that it could have any upon the appointment of

electors. His utterances are so important that I quote them in full:

"The manner of the appointment of electors has been placed by the Constitution of the United States in the Legislature of each State and cannot be taken from that body by the provisions of a State constitution. If the constitution of a State should provide that electors should be appointed by the Supreme Court of the State, that could not prevent the Legislature from providing that electors might be appointed by the vote of the people. The Constitution of the United States provides that Senators shall be chosen by the Legislature of each State, and it is not competent in the constitution of a State to require that Senators shall be elected by the people at a general election and thus take from the Legislature the right to elect. The power to appoint electors by a State is conferred by the Constitution of the United States, and does not spring from a State constitution, and cannot be impaired or controlled in any respect by a State constitution. It is competent for the constitution of the State to provide that State officers shall be chosen at an election where the voters have been registered, but it is not competent to make any such requisition as to the appointment of electors. If the Legislature provides that electors may be appointed by the people at the polls without having been previously registered it has a clear right to do so."

Frelinghuysen declared it a sufficient answer to the objection that the failure to enact a registration law rendered the election void, that the Legislature, in the appointment of electors, "acts under the authority of the Constitution of the United States and is entirely untrammelled by the State constitution." Justice Bradley's opinion omits all notice of the point, but is chiefly devoted to overthrowing the contention that the two Houses, in their capacity of a joint convention to count the electoral vote, have the same extensive power of inquisition that belongs to them as legislative bodies.

Hence, while the commission declined to receive evidence to impeach the title of the Hayes electors, only two commissioners, Senator Morton and Senator Frelinghuysen, denied the right of a State through its constitution to control the State Legislature in the appointment of electors.

The Democratic commissioners who wrote opinions in the South Carolina case were Bayard, Hunton, and Abbott. Thurman resigned from the commission, because of indisposition, at the close of the Oregon hearing, and Senator Kernan, of New York, was elected by the Senate as his substitute, but Kernan delivered no opinion in the case. Bayard held the objection to registration not well taken, because another section of the State constitution controlled. But in the Louisiana case he had declared that the State Legislature was not paramount to the State constitution in the appointment of electors so long as its regulations were not in conflict with the nation's organic law. Neither Hunton nor Abbott discussed the subject. Upon one proposition the commission were unanimous, that the Tilden electors were not the lawful electors, and that their votes should not be counted. The majority of the commission, in reporting to the two Houses that the Hayes electors were the duly elected electors of the State, declared that the commission

“must take notice that there is a government in South Carolina, republican in form, since its constitution provides for such a government, and it is, and was on the day of appointing electors, so recognized by the executive and by both branches of the legislative departments of the Government of the United States.”

The troops, it held, were placed within the State by the President of the United States, to suppress insurrection, at the request of the State authorities.

The two Houses, upon receiving the commission's report upon the South Carolina returns, separated. The Senate voted that the certificate showing the appointment of the Hayes electors should be received, the vote being 39 to 22, while the House voted against acceptance by 190 to 72. Thus, in every case referred to the commission, the two Houses were diametrically opposed in their views, the Senate always sustaining the majority of the commission, the House always sustaining the minority, and the vote in each instance in the Senate and the House being on strict party lines. Under the terms of the law creating the commission, the failure of the two Houses to agree resulted in the acceptance of the commission's report and the counting of the vote for the Republicans in every instance.

It would be digressing from our prescribed course to criticise the judgments of the Electoral Commission. Partisans *pro* and *contra* were heard in the press of the time; and probably, as opinions have long differed upon many of the debatable points of history,—whether, for example, the resistance of the people to Charles I. of England was justifiable or criminal, whether the convention of 1792 rightly condemned Louis XVI., or the massacre of the Albanian prisoners at Jaffa by Napoleon was defensible under the laws of war,—so they will long be in antagonism regarding the decisions of the electoral tribunal. The majority of the commission announced a doctrine in conformity with the Constitution when they declared the Federal authority powerless to question the determination of a State canvassing board upon the number of votes cast at an election of presidential electors. The reconstruction theory of a returning board with judicial functions is not likely to be revived; it is un-American. One proposition subtly urged upon the commission was that a statute creating a board with judicial powers to reject votes for presidential electors was

authorized under the Federal Constitution, and that the right of the Legislature of a State to enact such a law could not be limited by the constitution of the State. Most of the commissioners failed to discuss the question. Garfield, in his opinion in the Louisiana case, declared that the national Constitution had conferred upon the State Legislature the sole and exclusive authority to prescribe the mode of appointment, and consequently to vest the returning board with power to reject votes, but he added: "If I were framing a body of laws for Ohio, I certainly should not adopt the Louisiana law as my model."

Senator Bayard, in his opinion, expressed his total dissent from the notion that the Federal Constitution gave to the State Legislature a power above and beyond the reach of the people of the State through its organic law. The Hon. Matthew H. Carpenter, in his address in the Louisiana case, forcibly stated the same view in this form:

"When the Constitution of the United States says a State, in such manner as its Legislature shall prescribe, shall appoint electors, it refers of course to that form of government whose Legislature is restricted by its own constitution. It does not mean some Hottentot community. It means one of our States, one of the constitutional States; . . . our Constitution should be read just as though the words were that the Legislature shall prescribe a method in conformity with their own constitution."

In the South Carolina case Morton and Frelinghuysen expressed their unqualified approval of the doctrine that the State Legislature in the appointment of electors was subject only to the fundamental law of the nation. Thus, at the very threshold of the provisions of the Federal Constitution arises a question of transcendent import: Is the power which has been directly granted by that instrument to the several State Legislatures, in the ap-

pointment of electors, of such a nature that it is beyond the control of the people of the State, through their organic law? Has the Legislature of a State the supreme, sovereign authority to deprive the citizens of the State of the selection of presidential electors, although the State constitution may declare that their election shall be by popular vote? Under this Czar-like power, the Legislature might defiantly arrogate to itself the appointment of electors, or bestow it upon the judiciary or upon any agent or board or legislative committee.

It is a fruitless search through the arguments of counsel or the opinions of the commission for anything like unanimity of definition of an elector. Beyond repeating the few phrases of the Constitution, many were reticent, and those who spoke uttered dissonant theories. Evarts on several occasions used the term "representative elector." He declared that "the elector was not an officer of the State; that in no very considerable sense could he be treated as an officer of the United States; that he was an elector having the right under the Constitution of the United States to vote for President, and that he was a representative elector." Asked by Commissioner Thurman whether the elector was an officer at all, either Federal or State, Evarts replied: "I do not think he is. Certainly he is not a State officer." Judge Campbell, replying, twitted Evarts with inability to tell "what sort of a creature an elector is. I am not sure that in his conception he is a human being; . . . he is not an officer of the United States; he is not an officer of the State." So elusive is the electoral function that perplexity shrouds its ephemeral existence. If an elector declared by the Federal Constitution to be ineligible should be chosen, is his eligibility to be decided by the State? In other words, is the alleged offender against the nation's organic law to be exclusive judge or judge at all? Justice Campbell, under interpellation by

Commissioner Strong, insisted that Congress alone could create a tribunal to inquire into the competency of electors, because every State in the Union would be interested in the decision. Justice Miller, on the other hand, doubted the power of Congress to establish any tribunal to pass upon the validity of an elector's appointment or his eligibility to office. Justice Campbell's contention cannot lightly be ignored, erroneous as was his claim that the two Houses had power to count the popular vote.

The Florida decision suggests interesting questions. Had the *quo warranto* proceedings been initiated in time to enable the State court of last resort to pronounce a final decree before the electors met, would its adjudication that either the Hayes electors or the Tilden electors were the lawful deputies to cast the ballots of the State for President have been accepted by the defeated party? If such a controversy might be imagined as arising in the State of New York in a presidential election turning upon the vote of that State, would both parties acquiesce in the judgment of the State tribunal? Or assume that, after the vote of the false elector had been cast, the State court had in the clearest and most convincing manner established his failure of election, would the acceptance of his ballot not seem a species of treason? Would the view of a number of the commission's members prevail, that, once the office had been attained and the vote given, all inquiry should be barred, and the vote of the *de facto*, if not also *de jure*, elector accepted as beyond impeachment, although fraud in the election should have been made clear as day to the State authorities? These interrogatories are put with no thought of criticising the judgment of a majority of the commission. It was probably sound, and was certainly sustained by all arguments of convenience. The inquiry does not trench upon the plainly valid and unanswerable decision of the commission, that the

determination of the State's returning board, when not overthrown in appropriate legal proceedings, is binding upon the Federal counting power. But, as was forcefully said by the Tilden counsel, Florida sought,—through her Legislature, through her executive, through her courts,—to right what she conceived to be a monstrous wrong done to her people, in the false personation of her electoral voice by the unjust action of the State returning board; should such misrepresentation be endured when the State herself, by all her constitutional agencies, declared the action of the returning board fraudulent and void? To assume to question the validity of the determination in a direct attack upon it before the commission would be one thing; but to bring to the commission a judgment which, although *post hac*, might have been rendered by a tribunal of competent jurisdiction, would be another thing. Edwin W. Stoughton,<sup>1</sup> in his answer to Black, does not meet this question. He says:

“The Hayes electors cast and certified their vote as duly demanded, and with that ended all their functions. The litigation proceeded, and, true to the work expected of him(?), the judge, a few days before the vote of Florida was counted, decided that the Hayes electors were not duly appointed. Let us suppose the same decision made—as it might have been—after his inauguration as President. What effect would Judge Black, to be consistent with himself, give in such case to the decision of the Florida judge? The President should, upon his theory, descend from his great office and give place to Mr. Tilden, should he not? And then, supposing this to be done, let us imagine the decision reversed at the end of a year by the Appellate Court of Florida, what then should be done with Mr. Tilden? Should he, too, in imitation of his predecessor, depart in peace, that the latter might also enjoy

<sup>1</sup> “The Electoral Conspiracy Bubble Exploded,” 125 *N. A. R.*, 193, 213, 214.



the fruits of Florida justice? This game of shuttle-cock would not quite suit the majesty of the great office in question, nor the temper of the American people. . . ."

To say that the case is the same as though a decision were announced after Hayes' inauguration implies a misconception that is fundamental. The Constitution provides no machinery for the deposition of a President seated in the office without election to it. When the votes shall have been counted and the result declared by the president in the joint meeting of the two Houses as provided in the Constitution, the case is closed, the title has been conferred. But during the counting process, error is rectifiable; and while the majority of the commission was probably right in rejecting the *quo warranto* proceedings in Florida, and the legislative declaration, itself a solemn nullity, that the acts of the returning board were invalid and that the Tilden electors had been chosen or appointed, doubt is still permissible whether the decree of a State court of competent jurisdiction, affirmed on appeal or acquiesced in without appeal, supposing it were not made until after the electors had met and voted, could constitutionally be denied all recognition, if presented to the counting authority before the count was complete or the result declared. But if this doubt be not well founded; if, for the peace and security of government, the vote of the electors must be accepted as valid *de facto*,<sup>1</sup> the possibility that a great wrong should

<sup>1</sup> "Mr. Justice Strong frankly admitted in a letter addressed to Hon. George W. Jones, of Tennessee, bearing date February 26, 1877, that he feared a great wrong had been done in the Louisiana case. Mr. Justice Bradley said that he had serious doubts in the Florida case, and that he had written and rewritten several different opinions."—"The Electoral Commission of 1877," 38 *Am. Law Rev.*, 174, by Hon. John Goode, who was a member of the House of Representatives in 1877, and favored the Electoral Commission law.

In an article on "Presidential Inability," Governor Butler, in calling attention to the danger of political bias in the consideration of political

be done to a State and to the nation, through the application of a technical rule, is sufficient reason for the abolition of a system well calculated to engender discord and strife, and to effect subversion of the popular will.

questions, by any tribunal, said : "A most striking example of this tendency of the judicial mind was seen in the decision of the judges who composed a part of the Electoral Commission in 1876. Without impugning the motives or judicial fairness of any one, still the striking fact remains that every great question of constitutional law involved in that controversy was decided precisely according to the political relations of the several judges. If the majority were right, it was because they were Republicans. If the minority were wrong, it was because they were Democrats. If either were right, it was because they were politicians."—133 *N. A. R.*, 433.

## CHAPTER IX

### THE ACT OF FEBRUARY 3, 1887

THE Electoral Commission law was special legislation. It was passed to meet the crisis that confronted the people of the United States in the presidential election of 1876, Congress never having enacted a general law applicable to the subject, although frequently urged to do so. The act, as has been seen, did not attempt to determine where the Federal Constitution had reposed the power to count the electoral vote; it contented itself with conferring upon the commission the powers, if any, that both Houses of Congress possessed where there were two or more returns. The result was that the discussion, which had continued for generations in Congress, as to the proper repository of the counting power, was renewed before the commission. Nor did the commission attempt to settle that question. The crisis arose and passed without any legislation prescribing in what authority the counting power was actually vested, or fixing the boundaries of that power. The commission reached a negative decision in the Louisiana and the South Carolina case, as to the power of Congress in the counting of the electoral vote, when it held that, whatever might be the authority with which the two Houses in joint session were clothed, they had not the same broad power of inquiry which they might constitutionally exercise in a case involving the election of one of their own members.

The decision of the commission as to the lack of

power of the Federal Government to inquire into the correctness of the electoral vote of a State, or, as it is popularly stated, to go behind the returns, has met with increasing approval. The commissioners and the counsel who predicted that time would vindicate the justice of the decision were correct in their prognostications. When once the ultimate State authority charged with the determination of the results of a canvass of a vote for electors has definitely spoken, whether it be a State canvassing board, as in Florida or Louisiana, or a State canvassing officer, as in Oregon, its utterances must pass unchallenged by the Federal Government. The credentials of the electors, so far as the fact of their appointment is concerned, cannot constitutionally be subjected to further scrutiny. Upon such perplexing questions as must arise whenever an elector ineligible under the language of the Federal Constitution is chosen by the people, the commission reached no decision satisfactorily applicable to future cases.

Despite the gravity of the situation in 1877, Congress for many years failed to enact any remedial legislation. The Senate three times passed a bill in substance like the bill which ultimately became the Act of February 3, 1887, but the House on each occasion withheld its approval.

Edmunds, from a select committee of the Senate in 1878, had reported a bill with almost identically the features of the bill of 1887, and it had passed the Senate. Failing in the House, it was reintroduced in the Senate by Hoar in 1882. Pugh, of Alabama, speaking in regard to it in April, 1882, said: "No political or governmental power or duty has been more fully or ably discussed in both Houses of Congress than the power and duty of counting the votes of the electors appointed by each State to choose a President and Vice-President of the United States." In arguing for the power of the two

Houses in joint session to count, he declared that only a few—"not more, I am informed, than two of this august body"—entertained the opinion that the president of the Senate possessed this power.

"A few believe that, as the Constitution is silent as to where the power to count is located, it is a *casus omissus*, and the only remedy is an amendment to the Constitution; but the overwhelming weight of argument, authority, and public opinion has located the power and duty of ascertaining all of the facts necessary to the legal validity of the votes, and of settling all disputes in relation thereto, and of counting the legal votes and declaring the final result of each presidential election, under rules of evidence of their own creation, in the Senate and House of Representatives, constituting the Congress required by law to be in session on the second Wednesday in February succeeding every meeting of the electors."

But a study of the annals of Congress shows that the number of dissidents is far greater than Pugh assumed, and that it includes some of the most eminent constitutional lawyers who have ever sat in either House.

Garland, of Arkansas, who subsequently became Attorney-General under President Cleveland, and who had opposed the bill of 1878, resisted its progress in 1882. He acknowledged that it was "not to be disguised that it is the most important question that can be brought before Congress or the public," but, in his opinion, while the Constitution did undertake to deal with the question and to prescribe how the thing should be done, it was strangely silent as to matters of detail. "The Constitution stops short of doing what it should have done. If it stops short, nothing but an amendment to the Constitution can reach the case."

The bill of 1882 underwent amendment in the House. The House committee suggested a *per capita* vote in joint convention as a substitute for the concurrent vote

of the two Houses in separate session, and this proposition was carried in the House. Eaton, of Connecticut, was prominent in the debate in support of the constitutionality of this change, but he inconsistently affirmed, with great solemnity, that the exclusive authority to count the electoral vote was reposed in the House of Representatives alone.<sup>1</sup>

On December 8, 1885, Edmunds again introduced the measure in the Senate. It was referred to the Committee on Privileges and Elections, reported favorably by it, and passed by the Senate, but not without many weighty expressions of dissent. The purpose of the bill, as announced in its title, was to fix the day for the meeting of electors of President and Vice-President and to provide for and regulate the counting of the votes for President and Vice-President and the decision of questions arising thereon. Speaking of the measure, Senator Hoar declared that it had been the subject of consideration and discussion for more than twelve years. "The debate may almost be said to have been in progress during the whole time since the December session of 1875. The bill has passed the Senate three times, I believe, almost unanimously." In advocating its passage, Hoar stated its object to be "to remove . . . by legislation, and without an amendment to the Constitution, a difficulty which grows out of an imperfection in the Constitution itself." Whatever differences of opinion, continued Hoar, existed earlier in our history, two matters have been settled by the present generation: first, that the president of the Senate has not the power to count the electoral vote, and, secondly, that the power to decide questions and make the count is not exclusively vested in the House of Representatives. To clothe the president

<sup>1</sup> "As I believe in the Almighty, I believe this House has sole power to count the electoral vote, as in no other way can it be determined when it is to elect a President."

of the Senate with such transcendent office would have been a transgression of Lord Coke's maxim, not to make a man a judge of his own case, for the Vice-President is frequently a candidate for the presidential office. There was "a failure of the Constitution," a "*casus omissus*," a "failure to provide an arbiter" when the two Houses disagreed. The provision for such an arbiter came within the residuary power of Congress.

The debate in the Senate clearly reveals the fact that opinion by no means unanimously sustained Hoar's first proposition, that the president of the Senate had not the power to count. Nor were Senators in accord in their view of the constitutionality of the bill. If there were a *casus omissus* in the Constitution, as was originally argued by Henry Clay in 1821, had Congress power under the residuary clause of the Constitution to determine where the counting authority should be placed, and had it authority to vest the power, as it was inevitable that Congress would do, in itself?<sup>1</sup>

Senator Sherman, who was an opponent of the Electoral Commission bill of 1877, actively fought the new measure in the Senate, pronouncing it to be unconstitutional in principle and defective in detail. He especially challenged the provisions of the bill referring to single and double returns. He reviewed the history of the counts in 1821, in 1857, during reconstruction times, and in 1877. Of the Electoral Commission, he said: "We came to a point that did really threaten our national existence; when civil war . . . was happily avoided by a contrivance,—for I cannot call it much more, and I

<sup>1</sup> In a valuable article upon "The Electoral Count," 3 *Polit. Sci. Quarterly*, pp. 632-652, Professor John W. Burgess argues for the existence of the power, as have many statesmen since the debate of 1800. The opposing view has been sufficiently presented in foregoing pages. The deepest objection is that such a power blends and confuses governmental functions which the authors of the Constitution intended to keep separate.

suppose Senators did not think it much more; I did not support it at the time, but it was a wise measure"; and he added, "I should like to have the provisions pointed out to me which authorized Congress to make such a tribunal for such a purpose." Sherman trenchantly criticised the sections of the bill then before the Senate prescribing the procedure in case one return was received from a State, and he also objected to the methods the bill proposed for the solution of questions arising upon the presentation of two or more returns. If any measure were to be adopted, he favored a disposition of all the problems in a joint session of the two Houses, "polling each House separately to decide the result by a vote of a majority of the representatives of the people and the representatives of the States combined." He rightly argued that whatever was done would involve more or less danger.

"Without extending this debate further, this matter is surrounded by many difficulties. When I proposed the other day that the question should finally be decided by the two Houses of Congress acting in a joint convention, I was not entirely satisfied, because I could see that that involved great difficulties. . . . I do not wish to continue this discussion further. I do not believe that in the present condition of the bill we are likely to come to any wise solution of it. I would rather recommit the bill to the Committee on Privileges and Elections, which I know would approach this question with great care. At any rate I trust that we shall not now be forced to vote upon propositions that are not satisfactory to the Senate. . . . I would rather take the Supreme Court of the United States, much as I object to drawing that great tribunal into this controversy, because that court would at least give a decision; it would say which of two returns should be counted."

And he concluded his speech with the renewed assertion that the bill was not a sufficient remedy and that after



thirteen years' debate a point had not been reached "where the other House or the Senate can be satisfied with the solution that is proposed of this most difficult problem."

Ingalls made an eloquent attack upon the measure, satirically intimating that in such an opinion as Hoar's it was assumed that the perfection of human wisdom had been attained, and

"that any attempt to reach higher excellence could not result in advantage to the Senate or in any wiser solution of the confessed difficulties by which this question is surrounded." "This matter," he justly declared, "has been debated since 1789. It will continue to be debated, no matter what action may be taken by the Senate, until there is a constitutional amendment, a change in the organic law that shall entirely take the subject out of its present attitude and place it where it should be placed, in accordance with the predetermined will of the American people. So the Senator need not comfort or console himself by the expectation that, by any piece of legislative patchwork we can adopt here, debate upon this great question is to come to an end."

Ingalls also uttered direct and wholesome truth about the legislation of 1877:

"The Democratic majority in the House of Representatives at that time never would have consented to the creation of that tribunal [the Electoral Commission] had they not supposed that the fifteenth member of the Commission under the provisions of that statute was in favor of the election of Samuel J. Tilden. We all know the providential interposition by which that great and good man David Davis of Illinois was removed from that tribunal and translated to a happier sphere. In the dispensations of Providence, he was transferred from the bench of the Supreme Court to the Senate of the United States after the passage of the bill, and thus the fifteenth man upon the tribunal was in favor of the election of Mr. Hayes to the presidency. That is the way that seven to eight became

changed to eight to seven. I have heard much about the patriotism of the Democratic party in that contest and the moderation of its candidate in consenting to this measure, and renouncing the presidency; but I venture to say that, could they have foreseen in December, 1876 [January, 1877], when that bill was passed, what the transmutations of politics were to bring about, there never would have been a concurrence on the part of the House of Representatives in the enactment of the Electoral Commission bill. It was a fatal error under the Constitution for the Democratic party; and the bill we are now considering is but a faint and feeble and fragile imitation of the Electoral Commission. . . . It had never been determined by any tribunal, it had never been decided by any competent authority, that the phrase 'the votes shall then be counted' might not by an absolutely justifiable inference have been held to mean that the president of the Senate, being the custodian of those votes, having the right to open them, had also the right to count them; and, in the great contests of the future, emergencies may arise, emergencies are not unlikely to arise, in the state of the law on this subject, when it might be well not to be confronted by that pernicious precedent."

Legislative remedies, in Ingalls' judgment, were utterly futile. Nothing less than a constitutional amendment would meet the difficulty.

"Careful consideration of this subject will convince any thoughtful student of the Constitution that the scheme which has been devised and which now remains in our organic law is fatally defective, and that nothing can be done by way of legislation to cure the inevitable evils by which it is surrounded; and the more we proceed by legislation to patch, to bridge over apparent difficulties, to abbreviate the number of perils which surround it, by so much we retard and delay the exercise of the power which the people must ultimately be called upon to perform in adopting some system that shall remove the perils in which it is now environed."

Evarts, who was one of the number that believed in the right of the president of the Senate to count, advocated a recommitment of the bill, with the amendments proposed, to the committee, for "a fuller examination and a more complete treatment of all the possible or probable occasions of mischief and misconstruction that may arise when the mere act of the counting of the vote is to be performed. . . . My experience in attending upon the discussions of the electoral count satisfies me that the greatest difficulties are from the very instant and very limited means by which any doubts are to be solved." To one serious difficulty he called attention. Before the House of Representatives is authorized to elect the President, it must appear that the count shows a failure of a majority for any candidate of all the electors that have been appointed. To ascertain how the result stands, we must first learn how large is the whole number of appointed electors. Suppose, he continued, that, in 1877, the three votes of Oregon had been rejected upon the ground that electors had not been appointed:

"then you would have seen that, having reduced by three the whole body of electoral votes to be computed and divided, Mr. Tilden by having 184 votes would have been elected, because he would have had a majority of the whole electoral list reduced by three. . . . I know no more critical, no more embarrassing situation, under our Constitution, than a doubt produced in such a narrow state of votes, as to whether the House can elect or whether the next and inferior candidate is elected by his own right by having a majority of the reduced electoral colleges."

Evarts might have drawn an equally pertinent illustration from the electoral vote of Georgia in 1873. Three electors then voted for Greeley, although his death occurred before the members of the electoral college

met. The House of Representatives, upon Hoar's initiative, rejected these three votes as void, "the said Horace Greeley having died before the votes were cast," but the more conservative Senate decided they ought to be counted, for the reason, doubtless,—although the debates are not clear upon the point,—that these three electors had actually been appointed, and that a future case might arise where the fact of appointment might become of moment in ascertaining the total number of electors appointed and the number requisite to constitute a majority. It would have been a bad precedent to reject these votes as null and void. "It was an important question," as Morton said in the Senate debate of March, 1876, "because it went to determine what constituted a majority of all the electors appointed. It might become a very important question in a future contest."

Although disposed at first to view with favor Sherman's suggestion of a *per capita* vote by the Houses in joint session, Evarts, upon reflection, withdrew his support. Nor, he said, did he "look with complacency upon a reference to the Supreme Court or to any judicial tribunal." He was also hostile to the opening of judicial proceedings in the State below to intercept and interpret or suppress the vote of a State.

"The framers of the Constitution looked with extreme solicitude upon the principal fact and result that a President should be chosen; . . . their chief concern was . . . that the progress from the first act of voting up to the final declaration should be as little impeded and as little interrupted as possible."

This opposition to a determination by a proper State tribunal is consistent with the attitude assumed by Evarts before the Electoral Commission, but hardly with the prevailing view of the commission itself.

Evarts drafted an amendment, which was subsequently

incorporated in the third section of the bill, requiring the governor of each State to certify not only the names of electors, but also the number of votes given or cast for all persons voted for as electors by the people. This, he said, was neither more nor less than was required for the security of elections in our own States.

Wilson, of Iowa, doubted the power of Congress to legislate upon the subject at all. The fathers were certainly fallible, for they seemed to have taken for granted that no questions could ever arise upon the subject of counting the vote, and that nothing more would ever be necessary than to open the certificates which were produced in the presence of both Houses and to count the number and names as returned. "The bill we are now considering has not, in my judgment, the sanction of the Constitution." Regarding the general welfare cause, which was relied upon in justification of the measure, he said: "Here is a delegation of power to provide for carrying into effect the power to open and count the votes of the electors lodged in the president of the Senate. But it does not confer on Congress the power to assume unto itself the duty which the Constitution imposes on that officer." And he put this keen interrogatory, going to the crux of the whole subject:

"Can we conclude that the framers of our Constitution, when they conferred on the respective Houses of Congress these extraordinary powers [as in certain contingencies to elect President and Vice-President], intended to invest them with the still more extraordinary power of rejecting the votes of electors appointed by the several States, and thereby creating, by themselves and for themselves, the contingency which alone gives them the right and power to elect a President and Vice-President? The mere statement of such a proposition is its own refutation. And if no such power rests with the two Houses for concurrent action, how much more preposterous does it seem to be to claim that it rests with either House

alone, and especially with the House of Representatives, with which body the power to elect a President abides in the event of a failure of the electors to elect. . . . The framers of the Constitution clearly indicated their purpose to exclude "Senators and Representatives "from all power in or over the matter of the election of a President by the electors appointed by the State. . . . Our Constitution in this regard may not be in the best form. But we cannot change it by an act of Congress, nor by such act confer power on Congress not given by the Constitution. It is no new thing to find that our Constitution needs amendment. Fifteen articles of amendments testify to this fact. If we have discovered a defect in the respect of which the pending bill treats, it were better for us to do what has been done fifteen times heretofore, provide for an amendment of the Constitution in manner and form as it points out, rather than resort to the doubtful expedient now before us."

In the House of Representatives the progress of the bill was beset by similar objections, ably presented.

The bill of 1887 was amended when it reached the House. After a conference, agreement was reached upon the bill in its present form. Legislation seemed to be imperatively necessary, for the neglect of previous Congresses to frame an adequate law or a proposed constitutional amendment had led the country in 1877 almost to the brink of revolution, and it was the general sentiment of the supporters of the bill in both Houses that some enactment must be placed upon the statute book, even if it were not the best attainable. No trouble had arisen in the count either in 1881 or 1885. Early in February, 1881, a resolution was adopted by both Houses which in effect reinstated the method in use before the twenty-second joint rule went into operation.<sup>1</sup> It

<sup>1</sup> "When the Houses came to count the votes in Mr. Garfield's election, after fruitless efforts to provide a rule, or a law, under which they could be actually counted, it was necessary to resort to a temporary expedient by which all questions were suppressed that could give rise to controversy, in

provided for two tellers on the part of the Senate, thus following the Electoral Commission law of 1877, and it further provided that if it should appear that the electoral vote of any State had been given on any other day than that fixed by law, which was the case of Georgia, the declaration of the result should be in the alternative form adopted in 1821 and followed in 1837 and in 1857. The count of 1881 took place under this resolution, the electoral vote of Georgia being counted in the alternative. The count of February 11, 1885, was in accordance with a joint resolution adopted by both Houses, practically identical in form with the first portion of the resolution of 1881, omitting the provisions for alternative counting.

The first section of the statute substituted the second Monday of January for the first Wednesday of December as the day on which the electors of each State should meet and give their votes. The object of Congress in changing a date which had been in effect ever since the passage of the act of 1792 was to allow more time for the settlement in a State of any dispute regarding the appointment of an elector. Unhappily this additional month may stimulate nefarious activity, as it allows so much more time to fabricate objections and obtain dual returns.

order to declare a result which no one disputed, but which left the vote of Georgia uncounted. If New York had voted for General Hancock, Georgia voting, as she did, on a day not fixed by the laws of the United States, the result would probably have been a tie in the electoral college. One vote in the House might also have divided the States equally, and the Senate in that event would have chosen a Vice-President who would have become President, or else a person not elected by the people would have captured the office. It would have been beyond the bounds of a reasonable hope to have expected a peaceful result in this gauntlet of chances to which this great office would have been thus exposed. It should be enough to say to a wise people that all questions are open and dangerous that relate to the counting of the votes of electors. They are as numerous as it is possible for the ambition, the cupidity, the fraud, and the skill of wicked men to invent."—"Some Dangerous Questions," by Senator John T. Morgan, 133 *N. A. R.*, 315, 324.

Section 2 provides as follows:

“Sec. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”

The section provokes several comments. Section 2 of the Senate bill of 1882, unlike the present Section 2, provided that each State, pursuant to its laws existing on the day fixed for the appointment of the electors, might try and determine, before the time fixed for the meeting of the electors, any controversy concerning their appointment, and that every such determination made pursuant to such law so existing on said day and made prior to the said time of meeting of the electors, should be conclusive evidence of the lawful title of the electors who should have been so determined to have been appointed, and should govern in the counting of the electoral votes as provided in the Constitution, and as regulated by the proposed bill.

Section 2 of the Act of 1887 was criticised in Congress, and has since been criticised, as conferring undue power upon the State. Congress, it has been said, renounces too much jurisdiction. Professor Burgess declares that the section “reveals at the outset an excessively States'-right view of the whole subject,” and that “from a purely scientific standpoint one must consider the provi-



sion an *ultra* and unwise concession to the State," which, he thinks, is grounded upon the proposition that only the State in which the controversy or contest occurs has any interest in its determination. Nevertheless, if the prevailing opinions of the Electoral Commission of 1877 are to be treated as properly defining the relative limits of State and national power, the first part of the section is in accordance with the constitutional theory, whether that theory be scientific or not. The commissioners, both Democratic and Republican, agreed to the proposition that State control was absolute over the appointment of electors, except in the matter of time, and the majority of the electoral tribunal decided that any determination reached by the State as to the title of her electors must precede the casting of the electoral ballot. When the Florida case was before the commission, the Democratic counsel argued that the statute enacted by Florida in January, 1877, and the judgment of her circuit court upon the title of electors was a reversal of the decision of her State canvassing board and binding upon the commission; but the Republican counsel objected to this legislation and to the judgment, as *ex post facto*, and were sustained by the commission. Had the commission framed the first part of this section, consistency with the views of the majority would have required it to phrase that part as it now reads.

Section 2 of the Act of 1887 requires that every judicial or other determination of a contest over the appointment of an elector must be settled at least six days before the time fixed for the meeting of the electors, as well as settled by law existing prior to that day. So apathetic have the people remained since the crisis of 1877 that none of the States have provided by legislation for the settlement of controversies of contests concerning the appointment of their electors.

But whether Congress has not transcended its powers

in requiring that the State decision must be reached at least six days before the second Monday of January, is a matter for grave doubt. The Federal Constitution clothes the States with absolute control over the appointment of their electors, except as to the day of appointment, and it is difficult to perceive how Congress can interfere with this control for a single moment. Dibble argued that the six-day limitation was improper.

“Up to the day of election, the day when the electors are to cast their votes, the State power as to appointment cannot be interfered with in any manner, shape, or form by the Congress of the United States, or by any other power. Up to that time the State stands fortified by the privilege granted in the Constitution. The fact that the day is to be designated by Congress and is to be the same throughout the United States of course limits the time when the appointing power can be exercised.”

The same objection had previously been made by Eaton of the House, who was reminded by Browne that the section merely declared what evidence Congress would receive as conclusive of the fact of the selection of a particular elector by the State. But Dibble's objection was valid, if it be assumed that the States have exclusive control over the appointment of their electors. In a matter of such momentous importance as the correct determination of the electoral vote of a State, it is hardly befitting the dignity of Congress to take a sort of snap judgment against the State by declaring that the solemn adjudications of its tribunals will be treated as conclusive upon Congress only when made at least six days before the electors meet to vote. This provision might result in the gross injustice to the State of sustaining the title of one set of electors, although the highest court of the State had, before the electoral vote was cast, decided that set of electors to have no title, and their opponents, whose

certificate might also be before Congress, the actual representatives of the voice of the commonwealth. The interposition of the absolute bar of a judgment which Congress will treat as conclusive must, if it have any meaning, operate as an interference with the State's full control. The distinction between the appointment and the validity of the acts of the electors is fundamental and must not be lost sight of. The appointment, if made upon the prescribed day, is the sole concern of the State. But whether electors are constitutionally eligible, and whether they have voted in conformity with the Constitution of the United States, are questions which, as was intimated in the discussion of the Louisiana case, may be of wider import and may affect all the States.

Section 3 of the statute is as follows:

"Sec. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of government the lists of all persons voted for as President, and of all persons voted for as Vice-President; and Section 136 of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy

or contest, as provided for in Section 2 of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress, thereafter, he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.”<sup>1</sup>

Several important questions arise under this section. The section makes it the duty of the executive of each State to “communicate” to the Secretary of State of the United States a certificate giving the names of the electors and the canvass showing the votes given or cast for each aspirant for that office. It is also his duty to deliver to the electors themselves a certificate in triplicate to the same effect, and the certificate is to be transmitted by the electors, together with the return showing for whom they have voted for President and Vice-President. But how is the duty of the executive to be enforced? Suppose a State executive, following the example of Governor Grover of Oregon in 1877, should decline to furnish

<sup>1</sup> The framers of the law of 1887 neglected to change Section 141 of the revision of the statutes (containing the original provision of the Act of 1792), that whenever a certificate of a vote from a State had not been received at the seat of government on the first Wednesday of January after an election, the Secretary of State should send a special messenger to the district judge in whose custody one of the certificates of the vote of the State had been required to be lodged. As the Act of 1887 requires the electors to vote on the second Monday of January, this section needed amendment. Congress, accordingly, on October 19, 1888, amended Section 141 so as to change the date therein to the fourth Monday of January.

a certificate to a candidate ultimately decided to be appointed and to be entitled thereto? What is to happen?

It is questionable whether the Evarts amendment is salutary. So long as the State has made its determination, and certified it in the statutory manner, it is of no moment to Congress to be advised of any facts underlying the State returns. Why Congress should busy itself with the number of votes cast for an elector it is difficult to conjecture. Similar tabulations accompanied the conflicting returns in 1877, but the commission paid no heed to them. Even in Oregon's case these tabulations were ignored, the commission accepting a certificate of Oregon's secretary of State as a determination by the State canvassing authority. Nothing properly belongs before Congress or the counting power except ultimate State results. It was of far more consequence that the law should prescribe whether it is mandatory upon the State governor to deliver to the electors the certificate required by the Act of 1792, and what should be the consequence of a failure on his part so to do, or how his neglect should be remedied. The act should also have prescribed how the certificate might be impeached, assuming, as the Electoral Commission did, that it was impeachable. To be complete, the act should not only have defined all vague terms used therein, but have carefully distinguished between the appointment of electors and the exercise of electoral functions by lawful electors, the one subject being exclusively within State cognizance, the other, at least according to a respectable amount of opinion, and, as I interpret it, according to the act itself, a matter exclusively of Federal supervision.

The section which evoked the most debate, which was amended in the House, and assumed its final form only after a conference between the two Houses, is Section 4, which is as follows:

"Sec. 4. That Congress shall be in session on the second

Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the hall of the House of Representatives at the hour of one o'clock in the afternoon, on that day, and the president of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the president of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and, the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the president of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two Houses. Upon such reading of any such certificate or paper, the president of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to Section 3 of this act, from which but one return has been received, shall be rejected, but the two Houses

concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the president of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in Section 2 of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in Section 2 of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and, in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of."

This section embodies in statutory form the practice which has prevailed for several generations. The provision for two tellers on the part of the Senate is taken from the Electoral Commission law of 1877.

In the case of a single return from a State Section 4 prescribes that no electoral vote or votes from a State, which shall have been regularly given by electors whose appointment has been lawfully certified according to Section 3, shall be rejected, except where the two Houses concurrently agree that its votes have not been regularly given.

The main objection to this clause was fairly stated by Senator Sherman in December, 1886. "That," he argued, "is a dangerous power. It allows the two Houses of Congress, which are not armed with any constitutional power whatever over the electoral system, to reject the vote of every elector from every State, with or without cause, provided they are in harmony in that matter." The language is none too strong. If a Congress, protected by an adequate vote in each chamber, wished to destroy the Government, this provision would enable it to do so. It permits a majority, upon technical grounds, to defeat the popular will, to nullify constitutional government, and prevent the inauguration of a new President; and the danger grows out of the fact that Congress has invaded a province or department of the Government which the framers of the Constitution planned to keep absolutely aloof from and independent of the legislative branches. Nor are fears of a majority idle or chimerical. The security of the Government lies in the constitutional distribution of power. The Act of 1887 puts the very being of the nation at the mercy of a majority in either House,—a thing not only never dreamed of by the fathers, but the possibility of which they believed they had effectually averted. This provision was criticised in the report of the minority of the House committee.



Congress, from the outset of the Constitution, has gradually been usurping a jurisdiction over the electoral system. It is not necessary to decide whether the president of the Senate was to count the electoral vote. Whatever the ambiguity of the original expression "the votes shall then be counted," whatever doubt arises as to the true depository of the counting power or as to the extent of that power, one thing seems beyond contradiction: that the Constitution intended the operations of the electoral system, in all its phases, to be free from congressional interference or control. Even the Congress of 1877, that framed the Electoral Commission bill, would not declare that the counting power was in Congress; this dangerous and revolutionary theory first finds place upon the statute-book after one hundred years of national existence, in the Act of 1887.

It is difficult to find any basis in logic or reason for such congressional domination in the case of only a single return from a State. Section 2 of the act is at its outset predicated upon the just assumption that the appointment of electors is the sole concern of the State, and that the appointment may be reviewed by the appropriate State tribunal. Thus far the act is based upon the constitutional theory of the electoral office. Any final determination by the State authority of any contest or controversy as to the appointment of its electors is by section two made conclusive, and is to govern in the counting of the electoral vote, so far as the ascertainment of the electors appointed by the State is concerned,—language plainly implying a discrimination in the legislative mind between the function of the State, which is that of appointing, and the function of the counting power, which is to pass upon the regularity of the vote. And the State executive is required by Section 3 to certify to the appointment, and also to the determination of a controversy where any such decision has been made.

The Section (4) clearly means that in case of such prior determination in the State, only the regularity of the votes given shall be questioned in the two Houses. But what shall happen to the vote of the State, if the two Houses do not separately agree that it has been regularly given? Is it to be lost? If so, the vote of a State is sure to be counted only when both Houses agree that it has been regularly given. This clause of Section 4 and every other clause of the section raises the question so exhaustively considered in the debate of 1876 upon the Morton bill, as to the effect of non-concurrence of the Houses upon the State's vote.

The subject of multiple returns must be treated under several aspects. In the first place, if there has been a determination in a State of a contest over the appointment of electors, the votes regularly given by electors declared appointed by this determination are to be accepted by Congress, and the others discarded from consideration. In this single instance Congress renounces all right of inquiry into the State vote except to ascertain what votes have been regularly given, a field of inquiry that may cover electoral disqualifications and votes by eligible electors for unconstitutional candidates. If the two Houses do not separately concur that the votes are regular, State disfranchisement ensues.<sup>1</sup> In the second case, if conflicting State authorities or tribunals, two executives, for example, certify to different sets of electors, "the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors

<sup>1</sup> "It is not expressly stated in this period of the section that if the two Houses in separate assembly decide that such electors have not given their votes regularly, they may, by concurrent action, reject these votes, though it is to be presumed that such is the meaning of the law. The language of this paragraph is very confused, almost unintelligible; and since we have, as yet, had no actual precedents of interpretation, there are several points concerning which our predications cannot claim the attribute of certainty." —Burgess, 3 *P. Q. S.*, 643.

the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws." In this class of cases the two Houses acting separately are given the power concurrently to decide upon the title of electors, as well as upon the regularity of their votes. And if they should fail to agree that a set of electors represents the State, there is no provision as to what shall happen, but presumably the vote of the State is to be sacrificed. Or, in the case under examination, after having agreed upon the title of the electors, the Houses may disagree as to whether the votes have been regularly given, in which event the State loses its vote. In questioning the title of electors, how far is the inquiry to go? The act does not fix limitations. Thus in this class of cases the State has two chances of disfranchisement. Here Congress arrogates a power of review of the decision of the State tribunal, and if the two Houses do not concur (which they would not, if of opposite political complexion) the vote of the State is lost. In this particular case, as Sherman pointed out in the Senate, Congress is given "the power to exclude the vote of New York or any other State in the Union, not by the will of the two Houses, but by the veto of either House"; and, as he forcibly added, "If the Senate should reject the vote of a State and thus secure a party advantage, the House could reject the vote of another State to secure a like advantage."

In the third case, where there has been more than one return, but no decision by a State tribunal upon the appointment of electors, the State may be disfranchised through the failure of the two Houses to agree. The language is:

"Those votes and those only shall be counted which the two Houses shall concurrently decide were cast by lawful electors, appointed in accordance with the laws of the State, unless the

two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of the State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted."

The two Houses may in this class of cases inquire whether the electors have been legally appointed and also whether their votes are lawful votes. If the two Houses disagree upon either proposition, the votes (the word "lawful" is omitted before "votes") of the electors who are fortified in their appointment by the certificate of the State executive are to be counted. In this one case of a double return, a difference of opinion between the two Houses will not lead to the rejection of the State's vote, if there is a certificate of the State executive as to the appointment of the electors. In the fourth case, the same broad powers are conferred upon the two Houses. Where there is more than one return from a State, in which there has been no determination of the question who are its electors, and neither of the rival sets of electors is furnished with the certificate of the executive, the two Houses may determine who are the lawful electors of the State, and the votes of such electors shall be counted, unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully. But if another Oregon case should arise, the vote would be certain to be sacrificed, unless the two Houses were in political affinity,—as they were not in 1877.

The scope of this particular clause is uncertain. Recurring again to the Oregon case, and assuming that one set of electors presented the certificate of the governor, as did Cronin, Miller, and Parker, in 1877, while their

antagonists were armed with the certificate of the secretary of State, would this case present the question "Which of two or more such State authorities determining what electors have been appointed, as mentioned in Section 2 of this act, is the lawful tribunal of such State"? If so, those votes only would be counted which the two Houses acting separately should concurrently decide to be supported by the decision of such State so authorized by its laws; and upon that construction, had the law been in operation in 1877, Watts' vote, if not the votes of Odell and Cartwright also, would not have been counted, as the two Houses failed to agree. On the other hand, if the supposititious Oregon case is to be treated as a case "where there was no determination of the question in the State," unless the two Houses agreed,—which they did not in 1877,—"the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted," unless not regularly or lawfully given; in other words, the votes of Cronin, Miller, and Parker, who were armed with Governor Grover's certificate, would have to be counted. In the first case two out of three Republican votes would have been counted, or no vote at all would have been counted; in the second, the vote of all the Democratic electors would have been counted. Thus, a political majority in control of both Houses may reject the vote of a State when there has been no decision by a tribunal of the State upon conflicting returns, and likewise, "in case there shall arise the question which of two or more State authorities determining what electors have been appointed . . . is the lawful tribunal," a majority in both Houses may throw out the vote of the State; and in the case of a single return also Congress reserves like control.

Fortunately, or perhaps unfortunately, no occasion has arisen to test the Act of 1887, but it suggests problems

which must some day be perplexing and gravely embarrassing.<sup>1</sup> The provisions giving Congress any review of the determination of a State tribunal are, I think, unconstitutional, and all assumption of the counting power by Congress is in defiance of the spirit, if not the letter, of the organic law.

Such legislation is but clumsy patchwork at best.<sup>2</sup> What it does is to reveal the defects and lay bare the deformities of the whole electoral system. We may regard, even reverence, the work of the framers of the Constitution without extolling it as perfect. After a century's experience candor compels the admission that what the *Federalist* praised as "excellent, if not perfect," is a failure. Electors are not, and for a century have not been, the independent choosers of a President they were expected to be, but have become the slaves of party; more strictly puppets than the electors who formerly chose the Emperor of Germany; the machinery for counting the electoral votes is so defective that it has on several occasions prevented a true count, and has twice threat-

<sup>1</sup> "Suppose that only one return has been made from a State, and there has been no final determination of the controversy or contest in the State, and upon opening the certificates the objection is made that the appointment of the electors has not been lawfully certified or that their votes have not been regularly given, or that some of them hold offices of trust or profit under the United States, or that they were appointed on the wrong day; or suppose that all the proceedings were regular on their face, that all the electors were duly chosen and qualified, and found to be so by the State tribunal, but objection is made that the person voted for as President was not a natural-born citizen of the United States, or was not thirty-five years old, or had not been a resident of the United States for fourteen years,—it is not going too far to say that, if the result of the election should depend upon the decision of any one of these questions, by a partisan Congress, there would be at least very great danger of civil commotion and strife."—"Dangerous Defects in the Electoral System," J. G. Carlisle, 24 *Forum*, 265.

<sup>2</sup> Professor Burgess, who defends and commends it, except for what he deems its undue surrender of power to the States, admits its clumsiness and points out some defects.

ened the perpetuation of the Government; the interval that elapses between the popular vote and the meeting of the electoral colleges (by the Act of 1887 extended from one month to two) gives opportunity for all sorts of political intrigues and tempts us into the very dangers against which the inventors of the electoral system aimed to protect us; and the statute which is the outcome of one hundred years of electoral experience is not only usurpation by Congress, but is cumbrous and perplexing in the extreme. And when traps and pitfalls beneath the question of the ineligibility of electors are considered, the inquiry is pertinent, Why should such obsolete and defective machinery be kept in existence to imperil the future safety of the nation?

Sections 5 and 6 are as follows:

"Sec. 5. That while the two Houses shall be in meeting as provided in this act the president of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

"Sec. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate."

The purpose of Sections 5 and 6 is to facilitate the disposition of all contests, so that the result shall surely be declared in time to enable the new chief magistrate to be installed on the succeeding March 4th, but it is easy to imagine a controversy of such gravity and extent that it could not be justly or equitably settled between the second Wednesday of February and the 4th of March.

The Electoral Commission law of 1877 recognized this possibility, and therefore required the joint session for the counting of the electoral vote to commence on January 31st of that year. The leaders of that epoch were patriots, and both parties combined to press for a speedy decision, yet the commission remained in almost continuous session up to March 2d, and the commission was a small body of expert lawyers and judges, with resulting advantage for the expedition of business. Patriots may not always guide party deliberations, and the spirit of filibustering could readily bring about a perilous crisis in the State if it should have no executive head. While under the joint rule debate was not permissible, discussion or remarks in the separate chambers often consumed hours. On the other hand, the lack of power to debate has, again and again, been deplored and has several times led to the unjust disfranchisement of a whole State.

There is no attempt in the statute to determine the effect of the election of an ineligible elector.<sup>1</sup> Our examination of the proceedings before the Electoral Commission showed a divergence of views as to the effect of a vote by the people for an elector prohibited by the Constitution from appointment. One claim was that the vote for an elector who at the time of his election held an office of trust or profit under the Constitution of the United States was null and void. It was argued by the Demo-

<sup>1</sup> "The law purports to be mandatory only so far as it relates to the proceedings connected with the certification of the electoral appointments, and to the counting of the electoral vote. Indeed, even as to these matters it leaves a wide scope for disagreements, with their attending asperities and dangers.

"But it is by no means certain that the statute will be effective as to any of the matters to which it relates; for it seems tolerably clear to the common understanding that, when the two Houses of Congress meet to open the certificates and count the electoral vote, they possess all the powers conferred upon them by the Constitution itself, whatever they are, and no others, and that these powers can neither be enlarged nor diminished by a law enacted by the two Houses themselves."—J. G. Carlisle, 24 *Forum*, 265.



cratic counsel and the Democratic members of the commission that the Constitution said to the people of the State, "You shall not vote for this man." The result, according to the Democratic counsel, was that the candidate having the next highest number of votes was elected, but that extreme view was wisely repudiated by the Democratic members of the commission. According to them the effect of a vote for an ineligible elector was that the State lost that vote in its electoral college. Morton, and perhaps Justice Miller, entertained the opinion that a vote for an ineligible elector made him a *de facto* if not also a *de jure* elector, unless the State provided some tribunal for passing upon his ineligibility. Justice Miller in the Florida case argued that the inquiry as to Humphreys' eligibility came too late "because Mr. Humphreys, acting under the credentials which the law prescribes as his authority, has already cast his vote for President and Vice-President. That vote, being a fact accomplished, cannot be annulled by any subsequent proceeding to question his eligibility." Various Republican members of the commission regarded the prohibitions of the Constitution as not self-executing. There was no State law and there was no State tribunal to enforce them. Whether Federal law could create a tribunal to pass upon the question was considered doubtful. And all the Republican members of the commission were of the opinion that an ineligible elector could resign, and that if the State statute provided for the filling of vacancies in the electoral college, his associate electors could fill the vacancy. These notions were vigorously combatted by the Democratic commissioners, who agreed in treating the constitutional prohibition as self-executing. And they scouted the idea that if there were no State machinery to declare the vote for an ineligible elector void it would have to be recognized as valid, pronouncing this doctrine equivalent to conferring upon the

State the alternative of obeying or disobeying the organic law of the nation, at her own will. It is the author's opinion that Justice Field and Senators Bayard and Thurman had the better side of the argument. Had Napoleon Bonaparte or George III. or Talleyrand been elected an elector by any State, the fathers would not have long hesitated to declare the vote invalid and the place never filled, and they would have shown scant courtesy to *de facto* or *de jure* claims. If the prohibition upon the appointment of electors is not self-executing, the best of reasons is given for a general law upon the subject. By analogy, if the electors should elect as President a person whom the Constitution declares to be ineligible, would he nevertheless be entitled to the office, in the absence of legislation carrying the Constitution into effect? There is an imperative need of some provision of law to eliminate all uncertainty. The joint committee raised by the two Houses in 1837, in which such distinguished statesmen as Henry Clay, Silas Wright, and Felix Grundy represented the Senate, declared in its report that if the question of the eligibility of an elector should arise, the important question demanding immediate answer would be, what tribunal, under the Constitution, would be competent to decide. It was in their opinion the duty of Congress by some general legislation to settle whether the right to pass upon electors' qualifications belongs to the State or to the general Government. Intermediate events have added emphasis to the committee's suggestions, but the law of 1887 is absolutely silent upon the point. Another question needing legislative solution is, in what manner and under what circumstances the certificate of a governor in support of an electoral list may be attacked. The electoral tribunal of 1877 decided such a certificate to be impeachable, and the commission actually went behind and ignored it in the Oregon case. Merrick admitted in argument before

the commission that the certificate was not conclusive, but insisted that it could be set aside only by some competent tribunal established by law. The Act of 1887, which seems to invest a governor's certificate with new dignity, offers no suggestion as to how it may be impeached. If the two Houses in joint session are to pass upon the eligibility of an elector or the validity of a governor's certificate, or are to ascertain what is the actual determination of a State canvassing authority upon the popular vote for electors, it would seem impossible that justice could be done, in the short time at command, since debate is not permitted either in the joint convention or the separate sessions of the Houses.

The doubtful constitutionality of the Electoral Commission law has been generally recognized, but the enactment of 1887 goes far beyond that temporary expedient. That law upon its face acknowledged that Congress might not have any constitutional authority to count the electoral vote. The present law admits no such doubt, yet the Constitution has not been altered. The legality of the enactment was questioned by some of the ablest constitutional lawyers in the Senate and the House. Those members were right who protested against any such legislation, who declared the only sound remedy lay in an amendment to the Constitution. The act is a quagmire, but the common sense and patriotism of the nation should see to it that there shall never be a chance to flounder in the bog. An amendment would forestall all danger.

Nor does the Act of 1887 offer any solution of the vexatious question that provoked the turbulent discussion over the electoral count of 1857,—as to whether, if the electors of the State were through act of God prevented from voting on the prescribed day, their vote should be received or rejected. Judah P. Benjamin, whose rank and abilities as a constitutional lawyer will be readily

acknowledged, declared in the Senate that there ought to be a law directing that whenever the vote of a State presented for count should appear to have been given on a day different from that provided by law, it should be the duty of the president of the Senate not to count that vote. Other Senators urged that the provision of the Constitution was directory and not mandatory, that an act of Congress and not the Constitution fixed the day, that form should yield to substance, and that the Constitution never intended that an inevitable accident should result in the disfranchisement of a whole commonwealth. Garland, in 1882, admitted that whether the Constitution was mandatory or not "was a most perplexing question." Had the electoral vote of some State in the plight of Wisconsin in 1857 been essential in 1877 to the success of either party, the dusty records of Congress would have been thoroughly studied for argument to show how unjust such disfranchisement would be, and opinions in support of that view could have been readily found.

It is questionable whether Section 4 of the Act of 1887 is any improvement upon the corresponding provision of the Morton bill of 1873, and it has been shown how consistently that measure was criticised. The present act, in its provision that that set of returns shall be counted which the two Houses agree concurrently to count, is no better than the provision of the Morton bill. There is as pronounced a negative upon the vote of the State in certain cases under the Act of 1887, as there was under the infamous twenty-second joint rule. The vote of the State may quite as effectively be sacrificed by a failure of the two Houses to concur as by its rejection by one House. The test of the act will come when the two Houses are in antagonism. If they should disagree, there would be no ultimate arbiter. The Act of 1877 compelled their agreement, but the law of 1887 allows them to drift far apart. The 4th of March may come

and the title to the presidency and the vice-presidency remain in doubt because of a deadlock between the two Houses.

Were the statesmen of 1887 wiser than their compeers of 1876? Was it any more possible in the later year than in the earlier to confide the fate of a State's electoral vote to the two Houses in joint meeting? The laws of mathematics had not changed in the interval, and these clearly demonstrate that if the two Houses should not be in accord, but their concurrence be essential to the count of a vote of a State, that vote would be discredited and fail of acceptance. Nothing but the experience of Congress with the electoral vote of Louisiana in 1873 and the powerful leadership of Morton impelled the Senate, in 1876, by a meagre majority, to accept a bill which was conceded to be imperfect, and even this temporary approval was promptly withdrawn by a vote for reconsideration. Nothing but the experience of 1877 compelled Congress, against the judgment of its ablest members, to enact the law of 1887. The intervening discussion but emphasizes the conviction that the problem is insoluble, and that any legislation clothing the two Houses jointly with the power to count is of doubtful constitutionality and of more than doubtful expediency. Hoar himself admitted the deficiencies of the act:

"A perfect bill, as I believe, would provide for a common arbiter between these two bodies to which the Constitution has left the law-making power, and that has been the attempt of the statesmanship that has dealt with this subject from the beginning of the century to the present day; but every such attempt has failed. There never has assembled at the seat of government, since the government went into operation, a Congress whose two Houses would agree as to the person who should be the suitable common arbiter between these two bodies. John Marshall tried it and failed in 1800; Daniel Webster tried it and failed in 1824; the men of 1876 tried it

and failed, except for the single occasion with which the Electoral Commission bill dealt."

No more powerful plea against trusting to a measure vulnerable in its vital parts was made by the bill's opponents. What Dawes said in 1876, when he reluctantly lent his support to the Morton bill, reveals the temper of many who voted for the Act of 1887:

"The Senator has pressed upon me the question, What shall we do? I say, meet it fairly and squarely; bring forward some measure for an amendment of the Constitution upon a subject which the framers of the Constitution did not think there was any necessity for amending, but which subsequent experience has shown is vital and essential. But while such an amendment is pending, and until it becomes a part of the organic law, I shall vote for this bill."

Had a tithe of the intellectual force spent in efforts to frame legislation in defiance of the laws of mathematics been devoted to the preparation of an amendment to the Constitution, that beneficent end would long ago have been attained.<sup>1</sup>

<sup>1</sup> The debates in 1800 and in 1874, 1875, and 1876 require to be studied in connection with the electoral count law of February 3, 1887. "It is a very dangerous practice," said Pinckney in the Senate of 1800, "to endeavor to amend the Constitution by making laws for the purpose." This pithy criticism may well be applied to the Act of 1887.

## CHAPTER X

### THE ELECTORAL SYSTEM SHOULD BE ABOLISHED—DE- FECTS IN THE PROVISIONS OF THE CONSTITUTION REGARDING THE PRESIDENTIAL SUCCESSION

**T**HIS brief review of the history of the electoral system would fail of its purpose if it should not reveal how far the system as at present operated diverges from the theory of the convention of 1787. The electors were originally designed to be the agents of a State, armed with plenary authority to cast its vote for President and Vice-President in such manner as the agents themselves or a majority of them might will, all danger of abuse of the trust being intended to be averted by the selection of worthy and fitting instruments for the execution of this high office.<sup>1</sup> The chief magistrate of the nation, according to the unsophisticated notions of our fathers, was to be the nominee of these electors. In the evolution of history, without a syllable of alteration in the text of the organic law, the nature of the agency of the electors has been revolutionized; it has become a specialized agency never imagined by the framers of the Constitution. Electors are now the mere instruments of party, "party puppets," as Justice Bradley termed them, to perform a function which an automaton without intelligence or volition might as fittingly discharge. Ingalls hardly

<sup>1</sup> As far back as 1823, Benton characterized the elector as "nothing but an agent, tied down to the execution of a precise trust. Every reason which induced the convention to constitute electors has failed. They are no longer of any use, and may be dangerous to the liberties of the people."

detracted from the dignity of their supposed office when he likened them to "the marionettes in a Punch and Judy show." The source from which the theory of the electoral system drew its inspiration is obscure; it is not based upon any analogies in antecedent State experience, unless, perhaps, that of Maryland, which elected electors to choose the members of the State Senate. History has instructive but warning examples in the electors of the old German Empire, and of Poland, and to its elective principle historians have ascribed the downfall of that unhappy state. "The idea of intermediate electoral bodies," said Morton, in 1873, was, when the Constitution was formed, "working in the minds of the *doctrinaires* and revolutionists of France, and received Sieyès full development in the celebrated project of Abbé electoral which was adopted and had short life." An *Empire*, is body, as Mr. Bryce well says in his *Holy Roman* probably always a contrivance which has always had and will class of political continue to have seductions for a certain who sat in the convention, "theorists," but the distinguished men neither visionaries nor *doctrinaires*, but practical statesmen with clearly defined ideas regarding the necessity of a sharp division of legislative, executive, and judicial functions and the wisdom of adhering closely to the political experience of the States. Professor Alexander Johnston has conclusively shown<sup>1</sup> that the growth of the Constitution was institutional; that, with the single exception of the electoral features, all its provisions, if not precisely transcripts of the older State constitutions, are derivatives from them, and he said further:

"Not creative genius, but wise and discreet selection, was the proper work of the convention; and its success was due to its clear perception of the antecedent failures and successes,

<sup>1</sup> *New Princeton Review*, September, 1887.



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"For seventy-six years, that is, for nineteen presidential elections, no member of an electoral college has failed to vote

<sup>1</sup> Richard H. Dana, Jr.

detracted from the dignity of their supposed office when he likened them to "the marionettes in a Punch and Judy show." The source from which the theory of the electoral system drew its inspiration is obscure; it is not based upon any analogies in antecedent State experience, unless, perhaps, that of Maryland, which elected electors to choose the members of the State Senate. History has instructive but warning examples in the electors of the old German Empire, and of Poland, and to its elective principle historians have ascribed the downfall of that unhappy state. "The idea of intermediate electoral bodies," said Morton, in 1873, was, when the Constitution was formed, "working in the minds of the *doctrinaires* and revolutionists of France, and received its full development in the celebrated project of Abbé *condes*, which was adopted and had short life." An all logic body, as Mr. Bryce well says in his *Holy Roman* has yet been a contrivance which has always had and will subtlety will continue to have seductions for a certain sible methods of *theorists*," but the distinguished men always be known when at Philadelphia in 1787 were States where several electors *inaires*, but practical states have been appointed, an elector regarding the necessity of might resign, and thus give to the executive, and judicial members of the college the opportunity to fill the vacancies with their political friends; or a fraud might be perpetrated that would seem a mistake, by a failure to make a proper certificate or to obtain the prescribed authentication; or the transmission of the return required by the Constitution might in some manner be thwarted.

The elector in the constitutional sense is an abortive

<sup>1</sup> "And the elector is not only permitted but directed to vote by ballot. This is an anti-democratic provision which may cause a blunder, and could be easily used to cover a crime. An agent of the people should never be permitted to act secretly in transacting their business, except in cases where the public safety may require."—William Purcell, 140 *N. A. R.*, 112.

organism. He has no function to fulfil. But he is not merely functionless, he is dangerous. It is as true in the moral as it is in the material realm that any mechanism or organ that has ceased to perform its function is sure to work mischief, if not positive detriment. The famous phrase of the Constitution "the votes shall then be counted" has been like an apple of discord almost since the beginning of the Government. The authors of the Constitution probably intended the president of the Senate to do the counting, for in their eyes it was to be a simple computation or enumeration. As the fathers erred in failing to gauge the strength of the nascent democratic impulse, or in supposing that democracy would consent to renounce its prerogative of choosing a President, so they were equally mistaken in their assumption that counting would always remain a purely arithmetical process. It derogates little from their just claims to reverence to declare this portion of the noble edifice of the Constitution incongruous with the rest of the structure.

The practical inquiry so often made by our wisest statesmen is constantly reiterated—Why continue a system that has missed its functions; why retain in our constitutional machinery a piece of mechanism shown to be both dangerous and useless? After a century of discussion, after a crisis that had repeatedly been prophesied and that threatened the Government when it came, Congress finally passed the Act of 1887. That enactment was earnestly and honestly opposed as violative of the Constitution, because it vests Congress with a power never intended to be conferred upon it. The act was also criticised as giving Congress sovereign authority to disfranchise a State. It is an awkward piece of machinery which has never yet been put to genuine test. Similar criticisms were made upon the Morton bill, and both Morton and the sponsors of the Act of 1887 were forced

to admit that their devices for counting the electoral vote created no final arbiter for an occasion when the two Houses should fail to agree. The fathers of the Constitution were convinced of the importance of separating the executive from the legislative power. They would never have placed the executive under the subjugation of Congress, for nothing is more clearly shown by the debates of the convention than its unconquerable reluctance to give the choice of the executive to the national legislature. One central truth illuminates the wearisome, almost interminable discussions before the Electoral Commission of 1877, that the great effort of the framers of the Constitution was "to make the executive independent of the legislative and to place the election of the President beyond the reach or control of Congress." The act of 1887 is diametrically opposed to this theory, in giving Congress a veto upon the action of the States not only in the case of double returns but even, at times, in the case of a single return. The law of 1887 exalts Congress over the executive department, and gives it the power, by throwing out the votes of a State, to elect a President at its will. Nor did the creators of a bicameral Congress mean to introduce any such uncertainty into counting the electoral vote as would result from clothing one House with a veto upon the other. Counting, in its nature, is an affirmative process, and a count that is to be made by two independent Houses of Congress, where one may nullify the action of the other, is both illogical and illusory. We cannot dismiss such criticisms as chimerical because the nation was fortunate in meeting the difficulty of 1877. History furnishes no warrant for such optimism. The constitutionality of the present act might be directly assailed in a future contest, and there has hitherto been no decision upon it by the Federal courts. The details of the act are as vulnerable as the principle upon which it is based. Nor does the law provide a

tribunal to pass upon the qualifications of electors claimed to be ineligible. This is not a matter for determination by a particular State. The Federal Constitution creates the prohibition and Federal authority should enforce it, where the State is recreant. The appointment by a State of electors whom the Federal Constitution inhibits her from appointing is not the concern of that State alone. That the general Government had at least concurrent jurisdiction over the subject was suggested by Clay, Wright, and Grundy, in 1837. Other States are vitally interested in a State's obedience to the nation's fundamental law. The State has absolute and exclusive control over the selection and appointment of these agents of hers, subject to the one essential condition that in their appointment she has not disobeyed the Constitution of the United States, which, in the plainest and most unqualified terms, says to each commonwealth: "You may appoint your electors in whatsoever manner your respective Legislatures may direct, and when you notify the Government of their appointment, its only duty is to see that they present the proper credentials prescribed by your laws and by act of Congress; but there are certain classes of Federal officials that you shall not appoint, or your appointment will be a nullity." As the provision of the nation's organic law is explicit, the United States Government has no more right to renounce jurisdiction over matters within ultimate Federal control than it has to invade the jurisdiction of the State and inquire into the method and the fact of the appointment of lawful electors. Hence some tribunal should be provided by Congress to decide whether the State has obeyed the mandate of the Constitution, or the constitutional prohibition should be rescinded. Obviously the Federal power could not act until the matter comes within its jurisdiction,—until the last scene in the State drama is closed, and the lists, transmitted to the president of the Senate,

are opened in the joint meeting of the two Houses. The power of the United States to determine whether the State has disobeyed the paramount law has been doubted by distinguished judges and advocates, and affirmed by jurists of equal reputation; but unless the central authority is to abdicate a right, plainly its own, to ascertain whether its own fiat has been disobeyed, some tribunal should be created by Congress. But all doubt, all difficulty, all need for any tribunal whatsoever, would vanish with the abolition of the electoral system.)

Stanley Matthews, when before the Electoral Commission, recalled the quaint saying of Selden (in an essay on papal councils and their enlightenment by the spirit that dwelt in the Holy Ghost)—that he had generally found that the spirit dwelt in the odd man. The Electoral Commission was eulogized by the speaker as a tribunal that "could not be equally divided." But Congress, in the present electoral count law, has cast experience to the winds and has seemed to imagine that a court of two persons (two Houses), a theory never before devised,<sup>1</sup> should be created to discharge the exalted duty of counting the vote for the most august executive officer in the nation, if not in the world. The veto which one House would have upon the other would put the Government to death and usher in the reign of chaos, if party passion should ever have sufficiently violent sway. It is futile to dream that some arbiter may be found, and the law amended to realize the ideals of its framers. Every suggestion imaginable was made in the debate of 1876, but none proved acceptable. Of all schemes, the most pernicious would be to clothe the Supreme Court or any of

<sup>1</sup> I say "never before devised," because the Electoral Commission law, while it nominally conferred the power in a special instance upon the two Houses, so prearranged the decision as to prevent a difference between the two Houses upon the report of the commission from having any effect whatever.

its justices with the functions of an ultimate counting authority; but the danger of the adoption of such a plan has lessened since the experience of the country in 1877, when it was found that the pure ermine of the bench was no shield against partisanship.

In these circumstances, the dictate of practical wisdom is to abolish the letter of the system altogether—which might easily be done by a single amendment to the Constitution. ) If the people of the United States entertain to-day the repugnance to a vote for President and Vice-President by the people as a whole that was felt by the representatives of the small States in the convention of 1787, the theory of electoral representation might be preserved, and yet the ~~perilous~~ electoral machinery abolished. Each State might still have the electoral votes to which its representation in the United States Senate and in the House entitles it under the present Constitution. ( The useless and antiquated mechanism should, however, be discarded and the State, by an amendment to the national Constitution, be declared entitled upon the authoritative canvass of the popular vote to its proportional vote for President and Vice-President in a fictitious electoral college. The office of elector having disappeared, there would be no occasion for electors to convene in a State capital for the purpose of casting the vote of the State, and the State would be saved the attendant expense, and the possible loss of its vote if, for example, as happened in Wisconsin in 1857, the electors should be prevented by an accident from convening on the day fixed by act of Congress. All contention over the ineligibility of electors would cease, and such an imbroglio as arose over the appointment of electors in Oregon in 1877 would never vex the nation again. ) We should not, it is true, be able by this change to prevent the recurrence of such a disgraceful proceeding as a fraudulent and iniquitous determination of a State canvassing board, subversive

of the actual popular vote, but we should get rid of many perils and perplexities of the present system. Or, if the people desired to return to the district system so largely in favor at an earlier epoch of our history, that could be as readily accomplished. The district system of voting was the essential change embodied in the amendments to the Constitution unsuccessfully proposed at different times by Benton, Van Buren, McDuffie, Morton, and Sumner.<sup>1</sup>

The Constitution provides that "the Congress may determine the time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States." The difficulty which befell the Wisconsin electors in 1857 has been more than once mentioned in these pages. Fortunately the vote of Wisconsin was not decisive of the result, as Buchanan's election was assured whether the vote of that State was counted or rejected. The fathers wisely determined that the electoral colleges should meet on the same day, in order to forestall intrigues and machinations. (But the vote of a State might be prevented by "act of God" on the appointed day and that vote might be essential to elect a candidate.) While the Act of 1845 allows the States to authorize their electors to fill vacancies in the respective electoral colleges, it is not altogether

<sup>1</sup> Mr. George Ticknor Curtis some years ago advocated an amendment to the Constitution of the United States which he proposed to call the sixteenth article, which should provide for the assembling, at the seat of government, of an integral body of electors representing all the electoral colleges, and constituting an electoral chamber, the body itself to be the judge of the elections, qualifications, and returns of its own members. The members of this electoral chamber were then to vote for President and Vice-President *per capita*. Obviously, this plan would obliterate all State lines in the election of the chief executive. Mr. Curtis was convinced that "if any safe and prudent method can be devised which, while accomplishing other benefits, will take the whole process of counting the electoral votes out of the hands of the two Houses of Congress, it will be a consummation most devoutly to be wished."—29 *Century Magazine*, 124.



unreasonable to imagine that all the electors of a State might perish in a common disaster, in which event there would be no survivor or survivors to elect members to the vacant seats in the board. By the irony of fate, the electoral system has itself resulted in giving endless opportunities to the cabals, conspiracies, and intrigues against which the convention of 1787 fondly supposed it had impregably environed the choice of President and Vice-President. The earlier history of the country contains instances of coalitions and bargains tending to corrupt and debauch electors, and while Clay has been vindicated of the charge that he brought to Adams' support in 1825 sufficient electoral reinforcement to elect Adams and defeat Jackson, in consideration of a bargain that he should have the portfolio of State, the stigma of that unjust accusation attached to him for years. The very fact that two months elapse between the popular election and the meeting of the colleges in January, gives a chance for all sorts of intrigues and furnishes powerful incentives to corrupting negotiations. The intervention of electors, so far from being a potent defence against fraud, has become one of the most efficient agencies for its perpetration; and, as has been well shown by Ostrogoski, has tended to make the success of democracy formal rather than vital. Nomination, the most important element in the choice of the chief magistrate, is, under the iron-clad control of conventions, ruled by the very class of office-holders that the Constitution intended to deprive of all voice in the selection of the President.

Nor is the catalogue of the perils that hide beneath the constitutional plan exhausted by this recital. The House of Representatives becomes the body to choose the President when no candidate has a majority of the whole number of electors appointed. Electors may be elected by the people, yet never be appointed, for an elector chosen by the people might be ineligible under

the nation's organic law, or he might die or resign and a question arise as to the appointment of his successor or substitute. The subject is of the highest importance in its bearing upon the question as to when the time arrives at which the House is constitutionally warranted in entering upon the choice of a President. Evarts in the Senate in February, 1886, pointed out the desirability of incorporating in the bill for counting the electoral vote some provision clearly directing how and when this question should be settled. A candidate might not have a majority of the votes received by the president of the Senate or of all the electoral colleges, and still have a majority of the electors appointed. Had Georgia's three votes for Greeley been rejected, during a contest when their count had been essential to determine whether a candidate had a majority of the electors appointed, the partisans of that candidate would have insisted that he was elected, whereas the friends of a defeated candidate might have as reasonably argued that no one had a majority of the electors appointed and that therefore the election should go into the House of Representatives. There is no authority to decide between them.

The Constitution is silent upon the question who shall determine when the right of the House of Representatives to proceed to an election may be said to mature. Is the House to be the sole judge? The debates of Congress show that on several occasions during the tumultuous session of 1857, angry and dissatisfied members of the House asserted that the hour had come for the exercise of its prerogatives. It is not inconceivable that, in some future dispute over a single or a double return, one or the other of the two Houses may be tied so that no decision shall be possible, or that a deadlock between them may be prolonged, and the question would then be presented whether the House of Representatives should not itself elect the President. In 1876 there were in the

House members who urged that, inasmuch as there was no constitutional machinery for the counting of the electoral vote, the House would abdicate its office if it should not proceed to an election. As was said when the Act of 1887 was under consideration, the discussions over disputed returns might easily be protracted until the midnight of March 3d and the House might be influenced to assume the rôle of President-maker. There is a plain *casus omissus* in the Constitution, as Evarts and Ingalls pointed out in 1887, in its failure to prescribe some exact means for the determination of this question. These dangers are not fanciful, for one has but to peruse the record of presidential contests to find these or like claims repeatedly made in the more popular chamber.

Inasmuch as the Constitution imperatively requires the House, if there shall be no choice declared in the joint session, immediately to proceed to the election of a President, the choice of the chief executive is thus intrusted to a House of Representatives about to go out of existence; and such a House may even be under the control of the party defeated at the preceding November election. The fact that the vote in the House of Representatives for President is not *per capita*, but by States, introduces an additional element of a most confusing and unsatisfactory nature, for it results in giving the power to elect to a majority of States representing a minority of the population of the country.

One remarkable omission from Article II. of the Constitution not only shows that its framers were not infallible, but also emphasizes the importance of a speedy amendment to remove a danger that may at any time become actual. Subdivision 6 of Section 1 of Article II. provides as follows:

“ In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and

duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected."

The Constitution here makes provision for two classes of cases. The first is where the actual chief executive dies, resigns, or becomes unable to discharge the powers and duties of his office. In any one of these contingencies, the Constitution itself declares that the office held by the deceased, resigning or disabled President shall devolve on the Vice-President. There is no possible ambiguity or obscurity in the clause, except in the case of the inability of a President. Death is a fact which speaks for itself. As to "resignation," Mr. Justice Story says: "Congress, with great wisdom and foresight, has provided that it shall be by some instrument in writing, declaring the same, subscribed by the party, and delivered into the office of the Secretary of State." But inability is not easily determinable, and inability is not defined in the Constitution. In the debate of 1886 in the Senate, Ingalls, commenting upon this uncertainty of the fundamental law, declared that it afforded no means for determining when "inability" had occurred, or "its nature, extent, duration, and end"; and he contended that Garfield was disabled, under the Constitution, "from the moment when he sank to the floor of the railroad station, penetrated by the bullet of the assassin," and that from that moment the Constitution devolved the presidency upon Chester A. Arthur, who was not inducted into the office or clothed with its powers and duties until after Garfield's death.

The second class of cases consists of those in which there has been removal, death, resignation, or inability

both of the President and Vice-President. For any of these last-named contingencies, Congress is empowered to legislate,—for the Constitution gives no specific direction,—and to declare what officer shall thereupon act as President, but the Constitution prescribes that “such officer shall act accordingly, until the disability be removed or a President shall be elected.” While Presidents and Vice-Presidents have died in office, it has never yet happened that a President-elect or a Vice-President-elect has died. Nor has there ever occurred a resignation or removal of a President or Vice-President. The courage and patriotism of seven Senators stood between the country and the possibility of a removal of a President, when articles of impeachment were preferred against President Johnson, in 1868. Nor has Congress ever prescribed what shall constitute disability. The presidential succession law of 1886 prescribes, in brief, that if for any reason both the President and the Vice-President are unable to serve, a member of the Cabinet in the following order shall act as President until the disability of the President or Vice-President shall be removed or a new President be elected: the Secretary of State, Secretary of the Treasury, Secretary of War, Attorney-General, Postmaster-General, Secretary of the Navy, and Secretary of the Interior. In the judgment of some eminent constitutional lawyers, the Constitution has ordained a “periodicity,” as Evarts termed it, in the election of the President and Vice-President; and it seems to have been assumed in discussion in Congress that under the law of 1886, if the President- and Vice-President-elect should die, the Secretary of State of the outgoing administration would hold the office of President for the next four years. But this view has not met with universal sanction, and will not stand analysis. Here the Constitution is defective and nothing short of an amendment will remedy the defect. Let us consider the two cases: the death of the

President-elect, and the death of both President-elect and Vice-President-elect.

This constitutional provision above quoted does not, in strictness, apply to the case of the death, resignation, or disability of a President-elect, or Vice-President-elect, and the question is of transcendent significance—What would happen if the President-elect were to die before his inauguration? This inquiry involves several distinct queries. In the first place, if the candidate for the chief magistracy of the nation should die before the assembling of the electoral colleges in January, how should they vote? Strictly speaking, under the letter of the Constitution, the electors would have absolute control of the selection.<sup>1</sup> Should they choose the vice-presidential candidate, or cast their suffrages for some other party leader? Under the existing system, which treats the elector as a party puppet, the determination of this question might naturally fall to the party's convention or national committee. The case is not purely imaginary, for Greeley, the candidate of the Democratic party for the presidency in 1872, died before the colleges met to vote, and, while the electors chosen in some of the States to vote for him scattered their votes as they pleased among other candidates, votes were actually cast for him in the Georgia college. The Senate decided that the votes for Greeley should be counted notwithstanding his death, but the House voted that they should not be, "the said Horace Greeley having died before the votes were cast," and, under the twenty-second joint rule, the three Greeley votes were rejected, as the two Houses failed to concur. Under the Act of 1887, such votes

<sup>1</sup> "Should accident so shape events that the presidential candidate of the victorious party should die before the meeting of the electoral colleges, then the United States would again have a President who was not only in form, but in truth, elected by the electors. The effects that such an accident might produce are incalculable."—Von Holst, *Federal Constitution*, 87.

would have to be counted, unless they were held to be votes not "regularly" given, because for a predeceased candidate. The act might well have been more specific upon this subject. Such a contingency might expose electors to a dangerous temptation. Had General Grant died at the same time as Greeley, the strain to which the Republican electors might have been subjected can be readily imagined. The death of Hayes or Tilden during the earnest debate in the winter of 1876-77, upon the question where the power to count actually lay, might easily have made even an incorruptible elector conceive it to be his patriotic duty to break with the tradition of party fealty.

In the second place, if the colleges had voted and transmitted their returns to the president of the Senate, in compliance with the Federal law of 1792 (now embodied in sections 131-135, 138, 140, 142 of the Revised Statutes of the United States), and the successful candidate should thereafter die, but before the two Houses met in joint session in February, would the Houses go through the solemn pageant of appointing tellers and counting votes for a dead man, and would it be the duty of the president of the Senate to declare the recipient of the highest number of votes, although a dead man, the President of the United States? It is conceivable that such a ceremony might be coincident with the funeral services of the man thus pompously announced elected chief executive. The business of opening and counting the votes and declaring the result could not be postponed, however inopportune its occurrence might be. Whom should the president of the Senate declare elected? Does the Constitution make provision upon this subject, or does the section above set forth refer only to the then existing incumbents of the presidential and vice-presidential office? In the third place, the President-elect might die between the second Wednesday of February and the 4th

of March, when the same question would arise as in the case of his death between the second Monday of January and the second Wednesday of February, the only difference being that in this instance he would have been declared President while still alive. The electoral colleges could not be reconvened in either instance, because, upon the hypothesis, they would have already met, voted, and transmitted their lists to the seat of government. The present law of Congress makes no provision for their reconvening, nor could it constitutionally do so. Each college would, as the lawyers say, be *functus officio*. It would be a most elastic interpretation of the existing Constitution that would apply it to the death of a President-elect. It may be answered that the Vice-President would be declared elected to his own office, and that on the 4th of March he would be sworn into that office and immediately thereafter be inducted into the vacant office of the presidency; but such a procedure (while it might be acquiesced in) would not be technically or correctly within the purview of the Constitution, for the Constitution does not explicitly say what shall happen if a President-elect die. Suppose, after the conclusion of the proceedings of the Electoral Commission of 1877, and the antagonistic votes of the Senate and the House (which under the law made the decision of the commission binding upon Congress), Mr. Hayes had died, is it reasonable to assume that the Democrats of the country, smarting under a keen sense of injustice, believing themselves out-generalled by the Republicans and unfairly treated by the electoral tribunal, would have tamely submitted to the inauguration of Vice-President Wheeler as President of the United States? The fathers were most anxious to avert the possibility of the occurrence of an interregnum in the executive office at any time, and it may persuasively be urged that the course of procedure just outlined would be the constitutional one.



But the same catastrophe which removed the President-elect might also terminate the life of the Vice-President-elect. We have but to recall the assassination of Lincoln and the attempted assassination of Seward and other Cabinet officers to see how possible is such a train of calamities. And whether the deduction be sound that the Constitution would leave the country without a President if the President-elect should die, there can be no escape from the conclusion that the Constitution fails to point out who shall be the executive if both President-elect and Vice-President-elect die. Nor does it confer upon Congress the power to provide for such a contingency by legislation; for it authorizes Congress to provide who shall be President only when there shall have occurred the removal, death, resignation, or inability of the actually existing President and Vice-President.

It may be argued that, in the case of the death of the President-elect, the election would devolve upon the House of Representatives, the vote to be taken by States. The Constitution prescribes that

"the president of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed, and if no person have such majority, then from the persons having the highest number, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President."

The only contingency in which, by the Constitution, the duty of election falls to the House is when no person has a majority of the whole number of electors appointed. But in the supposititious case under consideration the majority of that number would have been given for a candidate deceased before the joint convention of the

Houses assembled, so that in strictness the House of Representatives could not constitutionally exercise the function of making a choice. It may well be doubted whether that instrument intended to confer upon the House of Representatives the duty of electing a President, where the President-elect died before the second Wednesday of February. Had Mr. Hayes died just prior to the second Wednesday of February, 1877, any claim of right on the part of the House of Representatives to proceed to the election of a President and to elevate Mr. Tilden to the presidency would have been bitterly contested, and no one can tell into what a sea of troubles such a calamity as Mr. Hayes' death at that juncture would have plunged the country. If the House should have undertaken this office, the question would have arisen whether the choice should be confined to the two candidates, then living, having the highest number of votes. From the tenor of a colloquy between Hoar and Ingalls, during the debate in the Senate on the electoral count bill in 1887, it would seem that Hoar's opinion was that if the successful candidates for both the presidency and vice-presidency at the November election should die before the second Monday of January, the House of Representatives would proceed to exercise its constitutional function; whereas if both died between the second Wednesday of February and the 4th of March—which would not be likely to happen, said Hoar, "once in five thousand years"—the Secretary of State of the existing administration would hold over under the presidential succession law until the end of the next four years. Ingalls dissented from both of Hoar's propositions as to what then would be the constitutional procedure, and emphatically contended that such a possibility as the continuance in office, for four years, of the Secretary of State of the old administration, was never contemplated when the succession law of 1886 was before the Senate;

and he refused to admit that the interim between the declaration of the result in February and March 4th was so short that such an evil as the death of both President- and Vice-President-elect might not happen. "The fatalities of the past twenty years have familiarized the public mind with the dangers that attend this subject. The people of this country are no longer prepared to disregard death as a factor in the great drama of political supremacy in this republic."

Hoar, in his autobiography, states his conviction that the Constitution is defective in failing to prescribe the mode of succession in the case of the death of both the President- and the Vice-President-elect. He says:

"That this is not an imaginary danger is shown by the fact of the well-known scheme to assassinate Lincoln on his way to the seat of the Government, and also by the fact that either the President or the Vice-President has died in office so many times in the recollection of men now living. President Harrison died during his term; President Taylor died during his term; Vice-President King died during Pierce's term; President Lincoln died during his second term; Vice-President Wilson died during Grant's term; President Garfield died during his term; Vice-President Hendricks died during Cleveland's term; Vice-President Hobart died during McKinley's term; and President McKinley during his own second term. So within sixty years eight of these high officials have died in office; five of them within thirty years; four of them within twenty years. I have also drawn and repeatedly procured the passage through the Senate of an amendment to the Constitution to protect the country against this danger. That (also) has failed of attention in the House. I suppose it is likely that nothing will be done about the matter until the event shall happen, as is not unlikely, that both President and Vice-President-elect shall become incapacitated between the election and the time for entering upon office."

There is too easy and ill-founded an optimism in Hoar's

apparently confident opinion that the death of the President-elect alone before the 4th of March would present no serious difficulty.<sup>1</sup> It is not at all clear that both the President- and Vice-President-elect must die between the time of counting the electoral vote and March 4th, to create a most novel, embarrassing, and alarming posture of affairs. Nevertheless, even if no difficulty should arise except in the contingency that both die, its occurrence would be fraught with such danger that the Constitution should contain provision for it. Some of these questions have recently been considered by the Committee on Privileges and Elections of the House of Representatives, in a report upon a bill to amend the presidential succession law so as to provide that the two Cabinet officers, the Secretary of Agriculture and the Secretary of Commerce and Labor, whose offices have been created since the passage of the act of 1886, shall in certain contingencies respectively succeed to the presidency. The report of the committee contains the following interesting paragraphs:

"Your committee are not called upon to express any opinion as to the merits of the existing law [Act of 1886]. It may not, perhaps, be out of place to call the attention of the House briefly to the inadequacy of the present provisions for the

<sup>1</sup>Caldwell, in the House in 1886, inclined to think the Constitution inapplicable to the case of a President-elect and Vice-President-elect, and declared that Justice Story and George Ticknor Curtis were his authorities. Curtis says: "But there is every reason to believe that this provision embraces the case of a vacancy in both offices occasioned by removal, death, resignation, or inability, not of the President- and Vice-President-elect, but of the President and Vice-President in office. It may be doubted whether the framers of the original Constitution intended to provide for a vacancy in both offices occasioned by the failure of the House of Representatives to elect a President, and the death of the Vice-President-elect; or a non-election of a Vice-President by the Senate before the fourth day of March. . . . It does not refer to the President- and Vice-President-elect whose term of office has not commenced."

presidential succession, and the need of early attention to that subject by the Congress. Who would determine the question of 'inability' on the part of the President, and when such inability ceased? If an election were ordered in case of a vacancy in the office, could it be for the unexpired term, or would it have to be for a term of four years, thus disarranging the four-year period of the Government?

"If a President-elect were to die before becoming President, would the Vice-President-elect be President for the term? Again, if a President-elect and Vice-President-elect should both die prior to taking their offices, would the Cabinet officers appointed by the outgoing President succeed in the order named in the present law when the new term began? Suppose the Democratic candidates for President and Vice-President had been elected at the last election and had died before new Cabinet officers had been confirmed, would the Republican Cabinet officers be in line of succession? There is no easy answer to any of these questions.

"The existing law provides that in case the succession shall devolve upon any of the persons named in the law, if Congress be not in session, and would not meet by law within twenty days thereafter, then the person upon whom the duties of the office devolve shall by proclamation convene Congress in extraordinary session, 'giving twenty days' notice of the time of the meeting.' Could he give more than twenty days' notice? Ought he not to be required to call Congress together in twenty days in no uncertain language? Or rather, should not the coming together of Congress in such a case be made to happen certainly, and not be dependent upon the proclamation of the officer succeeding to the duties of the presidency?"

There appears to be a plain conflict between the views, above expressed, of the late Senator Hoar and the views of the committee upon several of the questions suggested in the committee's report, notably as to whether the death of the President-elect might not create a hiatus in the succession. Evarts declared it a misfortune that the two Houses have no power under the Constitution to fill

"the little space between the electoral count and the 4th of March, if gap it be"; but the Constitution gives the power to legislate only when both President and Vice-President die, and if its terms do not cover other cases, there is a defect that can be rectified only by amendment. "If a President-elect were to die before becoming President, would the Vice-President-elect be President for the term?" is the vital inquiry of the Committee on Privileges and Elections. My view is that the Constitution has no application to the President-elect or Vice-President-elect in these provisions, and I have distinguished the three attendant contingencies. Hoar concluded that the House would elect in case of the death of the President-elect; but admitted that the death of both the President- and Vice-President-elect,—a contingency which he declared in the Senate might not happen once in five thousand years, but which in his autobiography he treats as far more serious,—would leave the country without any executive head, and that nothing short of a constitutional amendment could provide against the emergency.

An extraordinary provision of the twelfth amendment, due to the narrow jealousy of the small States, limits the House of Representatives in its choice to the consideration of the three highest names on the list. In 1824 and in 1860 there were four candidates, all of whom received a substantial number of electoral votes, so that it is easy to imagine a case where all four candidates might have the same number of votes or the third and fourth candidates have an equal number of electoral votes; and in either of these cases the question would arise how the House of Representatives, restricted to a choice from three names, could proceed to an election. Professor Johnston instances these possibilities in an article on the Executive in *Lalor's Cyclopædia*, and Mr. Carlisle, who was Secretary of the Treasury under President Cleveland, also comments on this remarkable

limitation.<sup>1</sup> Assuming that there might be three or four formidable parties, which he deems not unlikely, believing the tendency in the direction of dispersion rather than consolidation, Mr. Carlisle says:

“If, however, owing to the multiplicity of the electoral tickets, it should happen that more than three persons voted for as President should receive the highest number and an equal number of votes, then there would be no choice by the electoral colleges, and there could be no constitutional election by the House of Representatives, because, under the Constitution, not more than three persons could be voted for in that body.”

And if there should be more than two of the candidates for the vice-presidency in a similar category, the Senate could make no choice. “In all such cases,” he added, “the electoral system would exhaust itself; leaving the country without an elected executive, or a Vice-President to take his place.” By the original clause of the Constitution the President and the Vice-President were to be chosen in the House from the five highest upon the list. The resolution for the twelfth amendment, as it was adopted by that House, authorized the selection of the President from the same number of persons, but in the Senate, upon motion of Wilson Carey Nicholas, the number five was struck out and a blank inserted in its stead. Dayton, of New Jersey, wished to insert five, but his motion was rejected, whereupon Samuel Smith, of Maryland, moved to insert three, which was carried, 18 to 13. The opposition of the smaller States to the larger number was due to their fear that the use of the greater number would tend to throw the election into the House, and that a candidate from a large State who had only a small electoral vote—Jay had only one such

<sup>1</sup> 24 *Forum*.

vote in 1801—might thus secure the vote of that body, where the vote was to be taken by States. Thus Smith, of Maryland, asserted that if the number five were to be continued, and the House of Representatives made the last resort, the choice would devolve upon the House four times out of five. Butler, of South Carolina, was positive that if the small States agreed to the amendment, it would forever fix the combination of the larger States, which would choose not only the President but the Vice-President in spite of their smaller sisters. Nicholas thought that with the smaller number "you place the choice with more certainty in the people at large." John Quincy Adams, who had recently been elected to the Senate from Massachusetts, protested against any change in the number that had been approved by the House of Representatives.<sup>1</sup> He would suppose, he said, that there should not be three persons voted for; or that, though three or more should be voted for, none of them should have an actual majority of the electors. "What would be your situation then?" He instanced another case, that the highest two should have an equal number of votes, and that there were to be a third and fourth who should have an equal number also,—how could the three highest be found in this case when the third and fourth persons were equally high in votes? He also raised the question "whether some explanation should be given of the principle upon which the votes were to be counted." The irony of fate has made the system so carefully devised to protect the smaller States, especially when operated under the general-ticket plan, work against the designs

<sup>1</sup> Had Adams' argument prevailed with the Senate, and the number "five" been retained in the amendment, it is an interesting speculation whether he would have ever become President. Clay could then have been voted for in the House of Representatives, as well as Jackson, Adams, and Crawford, and Clay's popularity might have obtained him a majority of the States.



of its framers. The unpleasant possibilities of a failure of choice in the House for the reasons above given should lead to prompt amendment.

The Constitution fails to define the "inability" of a President, although it declares the consequences of such inability. The protracted illness of President Garfield led to considerable discussion as to what constitutes a presidential inability within the meaning of the Constitution, and what officer or body should pass upon the question of inability and determine its existence and who should discharge the powers and duties of the President in case of such inability. A series of articles in the *North American Review*,<sup>1</sup> in November, 1881, shows an interesting variety of opinion. Lyman Trumbull considered that the word "inability" includes both physical and mental inability. According to him, while the exercise of the powers and duties of the presidential office would devolve upon the Vice-President in a case of "inability," the Vice-President would not become President, and upon the cessation of the disability the President would resume his office. But so eminent an authority as the late Judge Cooley defined "inability" as permanent in its nature. The Vice-President was to act in the case of the President's inability, and as he could do so no more after the inability ceased than before it commenced, the inability contemplated must be continuing or one that, at least, would threaten an inconvenience in public affairs. He argued further that Congress had the power to provide by a general law for such cases. The late Benjamin F. Butler, of Massachusetts, construed "inability" as covering every bodily or mental condition which prevented the President from discharging the duties of his office or the exercise of his powers, but denied that there was any authority in Congress to make provision by legislation for the case of "inability" of the

<sup>1</sup> 133 *N. A. R.*, 417.

President alone, since the Constitution simply authorized Congress to make legislative provision in the case of the removal, death, resignation, or inability both of the President and Vice-President.

“The Constitution, providing expressly what Congress may do in case of inability of both President and Vice-President, excludes the idea that Congress may by law add to or diminish the constitutional provision as to what shall be done in case of the inability of the President only and the constitutional devolution of the duties of his office upon the Vice-President.”

The late Professor Theodore W. Dwight differed from all other participants in the discussion in construing the word “inability” in accordance with the English common law. “To take ‘inability’ or ‘disability’ in a popular sense would be to enter upon a shoreless sea of conjecture.” Whether the disability was permanent or temporary, the Vice-President having once become clothed with all the functions of the office of the chief executive, nothing, in turn, but his death, removal from office, resignation, or inability could take the office away from him. The condition of mind which constituted “inability” would have to be established by evidence under the forms of law which Congress is competent to prescribe, and when “inability” was properly established the office would devolve upon the Vice-President; who would thereupon become President, retaining the office until the end of the four years’ term unless a constitutional disability should intervene to require surrender of the office by him.

Analysis of Section 6 of Article II. of the Constitution also reveals grave uncertainties of meaning, if not absolute omissions, which, in view of the great importance of the presidential office and the necessity to public security that there should never be a break in the continuity of constitutionally exercised executive power, should be promptly remedied by constitutional amendment.

The likelihood of electing a minority candidate in the House of Representatives, where the choice depends upon an agreement between a majority of States having less than half the population of the country, and the possibility, which has several times ripened into a certainty, that the candidate having a majority of votes in the electoral colleges may have obtained only a minority of the suffrages of citizens, that is, less than a defeated candidate, should be sufficiently potent reasons for a change in the method of electing the President. When all the defects, weaknesses, and dangers of the present system are weighed, they should more than counterbalance the conservative disposition which is hostile to revision. Inasmuch as the framers of the Constitution, admitting the probability that their work might need alteration, provided two methods whereby it might be amended, the one with the consent of two thirds of each House of Congress and the approval of three fourths of the States, the other by means of a convention to be summoned into being upon the request of two thirds of all the States, the narrow, unprogressive spirit which fears or refuses to attempt a remedy for existing evils should yield to a more rational sentiment. We should approach the solution of these problems with the same kind of faith and courage that led the fathers to form the present Union. As has well been said:

"It is the spirit, not the letter, of our Constitution which has made it so successful in solving the greatest political problems with which our race ever had to deal, and in showing the world how civilized peoples may be governed. We only weaken this spirit, and do no honor to the Constitution or its founders, when we refuse to amend it in the way the document itself provides."<sup>1</sup>

<sup>1</sup> Prof. Simon Newcomb, *N. A. R.*, vol. clxxx., No. 1, p. 16.

The evils entailed by the system are not light or transient, but enduring and threatening. It is a patriotic duty not only to point out their existence, but to warn against their continuance. The consideration of methods for their extirpation is a business which may well engage the attention, as it will task the powers, of our wisest statesmen.

*Note to Chapter X*

Since the foregoing chapter was written I have found that Hoar, in 1898, concluded that there is no provision in the Constitution as to who should succeed to the presidency if the President-elect should die between the date of the vote in the electoral colleges and the inauguration. At the session commencing in December, 1897, Senator Frye, of Maine, introduced a resolution for an amendment to the Constitution providing for the succession to the presidency in certain contingencies. In the course of the discussion over the amendment, which had been referred to the Judiciary Committee, modified by it, and then favorably reported, Hoar read a letter received by him from Mr. Albert W. Paine, of Maine. Mr. Paine's communication states in substance that the Constitution fails to provide for the contingency of the death of the President-elect after the electors have cast their votes in January and before his inauguration on the 4th of March. Should such a death occur, says Mr. Paine,

"there is no provision whereby another President could be elected and Congress could not supply the deficiency, so that no President could afterwards be legally or constitutionally chosen, the only contingency provided for being that of the death of the President. The person elected by the electors as President does not become such until his inauguration in March afterwards. So that the provision cited does not cover

the case, and there being none other the defect charged really exists and needs an amendment."

Mr. Paine calls attention to the fact that had Blaine been a candidate for the presidency in 1892 and been elected, as his death occurred on January 27, 1893, there would have been no constitutional successor to President Harrison. Blaine was prominently mentioned as a Republican candidate in 1892, and it has been declared that nothing but his explicit refusal to accept precluded his nomination in the summer of 1892. His death on January 27, 1893, would have followed a successful vote for him in the electoral colleges, but would have preceded the electoral count, which took place on February 8, 1893.

## CHAPTER XI

### THE APPOINTMENT OF ELECTORS TREATED HISTORICALLY—EVILS OF THE GENERAL-TICKET SYSTEM

FROM the outset of the Government until 1832 great diversity prevailed in the methods in use in the different States in the appointment of electors; and repeated changes were made in almost every State in the law prescribing the manner of their selection. Inasmuch as each State Legislature could alter the method at its pleasure, the mode of election became "as various as the views of different States, and as changeable as the power and ascendancy of rival parties." Whether the district system, as Chief Justice Fuller asserts, and as Madison's writings seem to show, was considered by many of the members of the convention of 1787 as the most equitable, or whether there was any consensus of opinion among the delegates beyond that manifested in the decision to entrust the appointment to each State Legislature, it is easy to perceive the disadvantages entailed by the failure of the fathers to agree upon a uniform plan for all the States. Hardly had the Constitution been ratified by the requisite number of States ere contests arose over the method of appointment of electors; and these continued with more or less virulence until the almost universal adoption of the general-ticket system in 1832. New York failed to appoint any electors in 1788, and the State, through party contentions, was bereft of the honor of participating in the first election of Washington.

The Anti-Federalists and partisans of George Clinton, then governor of the State, were in control of the Assembly, while the Federalists dominated the Senate. The lower house was willing to vote for electors in joint session *per capita* with the upper house; but to this the Senate would not assent, and in the schism between the two houses the vote of the State was lost. In 1800, Hamilton, doubtless the greatest constructive statesman of his time, asked Governor Jay to convoke the expiring Legislature to inaugurate the district system of election without permitting the voters of the State to express any choice in the matter of the change; but Jay rejected the proposal, and the new Legislature chose Republican electors. In 1824, the contest between the friends of Crawford and the people's party as to the mode of choosing electors evoked such a proscriptive spirit that DeWitt Clinton was dismissed from his office of canal commissioner, but only to be elevated, by an outraged people, through an overwhelming vote, to the highest executive office in the State. Between 1788 and 1804 the Legislature of New Jersey directly appointed presidential electors. The law was changed so as to confer upon the people, by a vote throughout the State, the right to choose electors in 1808. But in 1812, in order to defeat the election of electors favorable to Madison and to ensure the appointment of Federalist electors to vote for DeWitt Clinton, the Legislature of that State, only three days before the date when the voters of that commonwealth expected to exercise their privilege at the polls, repealed the law giving the choice to the citizens and arbitrarily invested itself with the power of appointment.

At the first presidential election the appointment of electors was made by the Legislatures of Connecticut, Delaware, Georgia, New Jersey, and South Carolina. This mode of appointment may, in some instances, have been due to the fact that the governors of these States

failed to call the Legislature into session in time to enact a law for election by the people. Pennsylvania, by Act of October 4, 1788, provided for the election of electors on a general ticket. Virginia, by Act of November 17, 1788, was, for electoral purposes, divided into twelve separate districts, while for the election of Congressmen the State was divided into ten other districts. In Massachusetts the General Court, by resolve of November 17, 1788, divided the State into districts for the election of Representatives in Congress, and provided for their election December 18, 1788; and the resolve further prescribed that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for elector of President and Vice-President of the United States, and from the two persons in each district having the greatest number of votes, the two houses of the General Court by joint ballot should elect one elector, and in the same way should elect two electors at large. In Maryland, where the election was exciting, under an act passed December 22, 1788, electors were elected on general ticket, five being residents of the Western Shore and three of the Eastern Shore. In New Hampshire an act was passed November 12, 1788, providing that five electors should be elected by popular vote or, in the event of no choice by this method, that they should be appointed by the Legislature from among twice as many candidates as there were electors to be chosen. At the election, which occurred on the third Monday of December, 1788, the date prescribed by the Legislature, no elector received a majority, and the duty of choosing electors therefore devolved upon the Legislature, or General Court, as it was termed in the New England States. But no method of choice by the Legislature had been provided in the law, and the two houses at once fell into antagonism as to the mode of procedure. The lower house proposed a joint ballot, which would



have placed the selection under its control as the more numerous; but the Senate demanded equal right of appointment, and finally, to prevent the utter sacrifice of the vote of the State, the House was constrained to approve of the electors chosen by the Senate. But this was not without an indignant protest that its acquiescence should not be treated as a precedent. North Carolina and Rhode Island had not then ratified the Constitution.

Fifteen States participated in the second presidential election, in nine of which electors were chosen by the Legislatures. Maryland and Pennsylvania elected their electors on a general ticket; the people of New Hampshire did the same, and thus avoided a recurrence of the contest which had divided the two houses in 1788; and Virginia chose her electors by districts. In Massachusetts the General Court, by resolution of June 30, 1792, divided the State into four districts, two of these to elect five and two, three electors. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the House of Representatives. The Legislature was not then in session, nor did it meet until November 15th, while under the act of Congress of March 1, 1792, the electors were to ballot for President on December 5th. This short interval between the assembling of the Legislature and the date fixed for the meeting of electors allowed no time to enact a law for a popular election. The Legislature passed an act dividing the State into four districts and directing the members of the Legislature residing in each district to meet on the 25th of November and choose three electors. At the same session an act was passed dividing the State into districts for the election of electors in 1796, and every four years thereafter.<sup>1</sup>

Sixteen States took part in the third presidential election, Tennessee having been admitted June 1, 1796. In

<sup>1</sup> Some of these facts have been taken from the opinion in *McPherson vs. Blacker*.

nine States—Delaware, New Jersey, Georgia, Connecticut, New York, Rhode Island, Vermont, Kentucky, and South Carolina—the electors were appointed by the Legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, entitled "An Act to Alter the Mode of Electing Electors," provided for dividing the State into ten districts, each district to "elect and appoint one person, being a resident of the said district, as an elector." Massachusetts adhered to the district system, electing one elector in each congressional district by a majority vote. It was provided that if no one had a majority the Legislature should make the appointment on joint ballot, and the Legislature also appointed two electors at large in the same manner. In Tennessee an act was passed August 8, 1796, which provided that three electors should be elected, "one in the district of Washington, one in the district of Hamilton, and one in the district of Mero"; and, in order that the said electors might be elected "with as little trouble to the citizens as possible," certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Electors were chosen by the persons thus designated. The law of Pennsylvania, as has been stated, provided for a choice by general ticket, and the result in that State was thought likely to decide the choice of President.

"The friends of Jefferson had been very anxious for a choice by districts, which would have divided the votes; but the

Federalists, confident in their strength, had refused. Great, therefore, was their chagrin to find that the heavy vote of the trans-Alleghany district and the unexpected majority of two thousand for the opposition in the city and county of Philadelphia, had carried the State against them by a very close vote, only one of the Federalist candidates being chosen."<sup>1</sup>

In the fourth presidential election Virginia, the mother of Presidents, under the advice of Mr. Jefferson,<sup>2</sup> adopted the general ticket, at least "until some uniform mode of choosing a President and Vice-President of the United States shall be prescribed by an amendment to the Constitution"; and Madison introduced the general-ticket bill in the House of Delegates in a speech declaring that necessity impelled Virginia to this change. In fact, the preamble to the bill condemned the system. Virginia's departure from the district system and her adoption of the general-ticket plan, according to Barbour's statement in the House of Representatives on March 9, 1826, were "demanded by the right of self-defence and the duties of retributive justice." In Massachusetts, where parties were more equally divided, the appointment was assumed by the Legislature, which passed a resolution providing that the electors of that State should be appointed by joint ballot of the Senate and House.

"In Maryland the Federalists controlled the State Senate, and, had they succeeded in carrying the House, they would also have adopted a choice by the Legislature; but in the election for members of the House, which had just taken place, the opposition had obtained a majority, and the choice by

<sup>1</sup> Hildreth, *Hist. of U. S.*, iv., 690.

<sup>2</sup> "On the subject of an election by a general ticket or by districts, most persons seem to have made up their minds. All agree that an election by districts would be best if it could be general, but while ten States choose either by their Legislatures or by a general ticket, it is folly or worse than folly for the other six not to do it." Jefferson to Monroe, January 12, 1800. —Randall's *Jefferson*, ii., 521.

districts remained as before. Similar causes produced a similar result in North Carolina."

In Pennsylvania also the "opposition," as Hildreth styled the Republicans, "succeeded to their wishes in electing a majority of the lower house of the Assembly; but the Federalists still retained a majority in the Senate."<sup>1</sup> The popular body wished a joint ballot, but the Senate would not consent. The differences were finally harmonized by the passage of a bill by which each house was to nominate eight electors, from whom by joint ballot fifteen electors were to be chosen. The result gave the Republicans eight and the Federalists seven. It was the fear that the Legislature of Pennsylvania would cast the electoral vote of the State that led Ross to introduce in the Senate of the United States the bill of 1800. Six States, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which theretofore followed that course. Tennessee, by Act of October 26, 1799, designated persons by name to choose its three electors as under the Act of 1796.

In the fifth presidential election, the first under the twelfth amendment, the contest was close, party rivalry was intense, and the changes in the law governing the mode of appointment of electors in several of the States were utterly indefensible. Massachusetts, which holds a position of primacy for variations in the method of choice of electors, now abandoned legislative appointment and passed a law under which all her nineteen electors should be chosen over the entire State by general ticket. The passage of the law was vigorously opposed and a strong protest made by the minority of the Legislature. This protest was grounded in popular feeling, and the Republicans had the satisfaction of carrying all the electoral

<sup>1</sup> Hildreth, *Hist. of the U. S.*, v., p. 390.

college under the substitute system.<sup>1</sup> Connecticut, with the end in view of keeping the Republicans from returning many electors, retained the system of legislative appointment. New Hampshire abandoned the legislative method in 1804 and again employed the general-ticket system, but the Republicans were also successful in this State. At the presidential election of 1808 there was another *volte face* in Massachusetts. The Federalists, being in the ascendancy, provided for the election of electors by the Legislature, despite a message from the governor advising that the appointment of electors ought to be submitted to the people. New Jersey this year went over to the general-ticket system.

It would be tedious to pursue the narrative of the numerous, almost kaleidoscopic changes in the methods of selecting the men who were to represent the States in the choice of President and Vice-President. The animating purpose of the "diversified and clashing expedients" adopted by the States was the political advantage of the party or faction in temporary control in any State; certainly, whatever the intention of the convention of 1787, its surviving members could not have felt much gratification in the actual operation of this feature of its work. Nor were these startlingly frequent changes limited to the electoral system; they pervaded the field of congressional representation. Frequent resolutions were introduced in Congress to amend the Constitution so as to establish the district system of representation for members of Congress and the choice of presidential electors. As early as 1801, Hamilton bent his energies towards the passage of an amendment providing that Congress should lay out the districts, and a resolution drawn by him was presented to the Legislature of New York by De Witt Clinton and adopted by it, and then forwarded to Con-

<sup>1</sup> Jefferson's pleasure at "the return of Massachusetts into the fold of the Union" was keen.—*Hist. U. S.*, Henry Adams, iii., p. 8.

gress. In December, 1813, a resolution for amendment was introduced in the House of Representatives by Israel Pickens, of North Carolina, who was ably seconded by his colleague, William Gaston, afterwards a judge of the State Supreme Court. The Pickens amendment was twofold: it provided for the election of members of the House in districts, and required electors of President and Vice-President also to be voted for in districts. Resolutions of the Legislature of North Carolina advocating such an amendment were also presented. Pickens described to the House of Representatives the unhappy condition of affairs in North Carolina, when, just prior to the election of 1812, she abandoned the district system and decided to vest the choice of electors in the State Legislature. This change caused more agitation than had been witnessed since the Government commenced; the district system was, therefore, immediately re-established by the Legislature and "a resolution passed by a unanimous vote in both branches recommending the principle of the amendment now proposed, extending it also to Representatives." Pickens acutely perceived that the establishment of the district system would be the death-knell of sectional parties. Gaston strongly urged the amendment because it would insure the minority in a State "against the intolerance of the majority." He drew a striking picture of the electoral system as designed by the convention of 1787 and as prostituted by caucus nominations:

"It was contemplated that the people from each State should select from among the wisest and most virtuous of their neighbors the persons best qualified to vote for a President. The original primary act was to be theirs — spontaneously theirs. . . . The electors thus chosen, thus free from all irregular impulse, convening in each State on the same day, and under circumstances most favorable to deliberation, were to vote for a President, and immediately afterwards to mingle

with their fellow-citizens, from whom they had been called forth but for that special purpose. Every practicable obstacle was supposed to be thrown in the way of 'cabal, intrigue, and corruption.' Thus Beauteous smiled the theory. . . . How hideous the deformity of the practice. The final step made in the election is by those whose interference the Constitution prohibits. The members of the two Houses of Congress meet in caucus, or convention, and there ballot for a President or Vice-President of the United States. The result of their election is published through the Union in the name of a recommendation. This modest recommendation then comes before the members of the respective State Legislatures. Where the appointment ultimately rests with them, no trouble whatever is given to the people. The whole business is disposed of without the least inconvenience to them."

But the large States were potent enough to defeat the resolution.

Pickens renewed his efforts in December, 1816. Erastus Root, of New York, declared his approval of the selection of Representatives in districts, but opposed the election of electors in that manner. Jabez D. Hammond, the historian of New York, who was also a member of the House, ably supported the principle of the Pickens amendment. Hammond, thus condemned the existing method: "The power of the States to choose or direct the manner of choosing electors for the presidency is a rotten, a gangrenous part of our Constitution, which, if not removed, will infect and poison the body politic."

The chief opposing argument was the danger of "gerrymandering," and of the loss of power by the large States. The resolution was divided before the vote was taken. A favorable vote was obtained upon the proposition for the election of members of the House in districts, but the suggestion to elect electors in districts encountered successful hostility, and the House ultimately laid the resolutions upon the table.

On December 5, 1823, George McDuffie, of South Carolina, one of the ablest Representatives that State has ever had in the House, moved the appointment of a select committee to formulate an amendment providing for a uniform method of electing members to the House of Representatives and of choosing electors for President and Vice-President, the election of these last-named officers in no event to devolve upon the House of Representatives. The report of the committee, together with the resolutions of amendment proposed by it, was presented to the House on December 22, 1823. The report advocated the division of the States into districts, by act of Congress, for the election both of Representatives and electors. Although the discussion of this report might properly find a place in the succeeding chapter, it may be introduced into the present chapter, for no abler indictment of "the existing system, if system that may be called which is without system," has ever been presented in Congress; nor has any discussion elicited more conclusive proof of the injustice of the general-ticket method.

"Pre-existing bodies sufficiently small and permanent to be exposed to the tampering arts of intrigue and corruption ought to have no agency in the election of a President of the United States, upon any ground short of absolute necessity. State Legislatures are bodies of this description, and there is no pretence of a necessity for interposing them between the people and the electoral college."

Indeed, in proportion as the number of such intermediate agencies is increased, the chances are multiplied that the "will of the people" (a phrase much in vogue at the time) will be defeated in the choice of a chief magistrate. Nothing, said the report, would arouse the people to intelligent action so much as direct participation in the election of the chief magistrate. The people

"have been so long accustomed to have no practical agency



in the election of a President that the idea is not uncommon that they have nothing to do with it. As the inevitable tendency of this state of popular indifference is to increase the power and influence of political managers and unprincipled combinations, it is of the last importance that it should be corrected if possible."

The committee then inquired whether "the people should vote by a general ticket or by districts." ; It was the intention of the fathers that the President should be the choice of the people and not of the States. It is true, they contemplated an infusion of the Federal principle into the election in the proportion of the Senators to the Representatives in Congress; but to extend that principle to the whole body of the electors would be nothing less than sacrificing the rights, the interests, and the power of the people to the false and imaginary idol of State consolidation.

"It can be demonstrated that the system of voting by a general ticket would render this fundamental principle of our Government the sport of accidental combinations. Six of the States, for example, if they give a unanimous vote, can elect the President. But, if they vote by a general ticket, the candidate who obtains a bare majority of the popular vote receives the unanimous electoral vote of the State. So that, assuming the population of the United States to be eight millions, a little more than two millions of the people might elect the President."

The report touches the vicious principle of the general ticket in such telling phrases as these:

"Let us suppose that there are two States, one containing nine hundred thousand people, and entitled to thirty electoral votes, and the other containing eight hundred thousand people and entitled to twenty-six electoral votes. Let us further suppose that there are two candidates for the presidency, of whom one is supported by five hundred thousand people of the

first supposed State, and the other by the remaining four hundred thousand, and the entire eight hundred thousand of the other State. Under these circumstances, the candidate who obtains the support of only five hundred thousand of the people would receive thirty electoral votes, while twelve hundred thousand people could give the opposing candidate only twenty-six! According to this system of false equations, a large minority of the people is precisely equal to no minority at all. By thus entirely excluding the State minorities from the calculation in making up the general aggregate the people are literally immolated by hundreds of thousands at the shrine of an artificial and delusive system, which, by making a majority equal to the whole vote in each State, gives a minority an equal chance for the ascendancy in the Union."

The true principle prevails in all other popular elections throughout the United States. In the election of the governor of a State by the people, for example, a candidate does not count the unanimous vote of every county where he happens to obtain a majority, but the respective majorities of the several candidates are added to their respective minorities, and the aggregates thus produced are taken as the true expression of the popular will. In eloquent language the committee concluded that it was under the most solemn obligation to reject a plan "which would array States against States in ambitious conflict for the mastery, and equally sacrifice the inalienable rights of the people and the general harmony of the Union." To the general-ticket system the committee deemed there was one unanswerable objection. "It is a practical proposition, conclusively established by the experience of all the States where the experiment has been made, that this system tends by inevitable necessity to transfer into the hands of a few the power of controlling the entire suffrage of the State." With the spirit of prevision which just and acute analysis of evil symptoms either in the body politic or the human mechanism often

awakens, and which seems akin to prophecy, the committee asseverated that if the plan of voting by general ticket were established,

“ a central power would spring up in every State, consisting of the ruling politicians of the day, who would be bound to the people by no tie of regular responsibility, and be, in every respect, more liable to cabal, intrigue, and corruption than the Legislature itself. And when we reflect that the entire electoral vote of a State, upon which the presidential election itself might turn, would frequently depend upon the integrity of a few men, perhaps of a single individual, it is difficult to conceive a state of things in which there would be stronger inducements or greater facilities for intrigue and corruption.”

By dividing the State into districts, the report argued that all these evils would be avoided. Perceiving also the preponderance given to the small States in the selection of a President through the House, the committee proposed that this method of choice be abolished, and that a second meeting of the electors should be held in case of a tie vote to decide between the highest candidates. Thus mutual concessions were asked both from large and small States.

As nothing came from the debate in 1823, consideration of the report of the select committee was resumed in the House on February 15, 1826. The chairman, addressing the House at great length, reiterated the various reasons for the adoption of the district system, so admirably set out in the report. The discussion continued daily until a vote was reached upon the resolution, as divided, on April 1, 1826. The convictions and preferences of a large number of members were expressed during the debate. Some of the strongest men in the House, including Edward Livingston, of Louisiana—author of the civil and the criminal code of that State and the draftsman of Jackson's famous nullification

proclamation, and brother of New York's first chancellor, Robert R. Livingston—and Michael Hoffman, of New York, advocated the passage of the resolutions, while the opposition was ably represented by Storrs, of New York, Archer and Stevenson, of Virginia, Edward Everett, of Massachusetts, and others. Livingston went so far as to advocate the abolition of all electors. Polk, who represented Tennessee, commended and supported him, and Hoffman asserted that his constituents wished a direct vote by the people. James Buchanan, also destined to be a President, sat in the House as a member for Pennsylvania, but did not speak upon the amendment. Storrs assailed the proposed amendment as at variance with the theory of the "compact" between the States. "It was a system of consolidation, and the large States should oppose being broken into fragments." Everett, in his hostility to any change, took the untenable position that the power to amend, which was reserved in the Constitution, was to be exercised only by making amendments which were consistent with the leading provisions of the Constitution. If the great war amendments be tested by Everett's theory, they were an invalid exercise of the amending power, for they were opposed to one of the essential compromises of the Constitution. Yet the speaker plainly intimated that the Constitution was defective in the very particulars in which amendment was then sought: "I say boldly—if it requires boldness to make the avowal—that I regard it in this most essential feature an imperfect system of government." Everett sophistically argued that the general-ticket and the district system amounted to the same thing:

"On the general-ticket system, supposing it to be uniformly adopted throughout the United States, the unrepresented minorities would be balanced by each other, or, in other words, the minority whose voice is not heard in one State on one side

of the question would be balanced by the minority whose voice is not heard in another State on another side of the question. On the district system the same result would take place. The minority represented in the electoral colleges on one side of the question in one State would be balanced, and being balanced would be neutralized, by the minority represented in another State on the other side of the question, and therefore in their practical operation there would be very little to choose between the two systems."

While it is true that under the district system the voice of the minority in the district would be annihilated, the argument served only to show that, gross as were the injustices of the general-ticket system, the district system would not be an ideal substitute. The Constitution, said Everett, was based upon compromises, and the contract into which the States had entered should be sacredly fulfilled, but there should be a protest against any such inferences as were drawn by the honorable mover of the resolutions. "I will protest against popularity, as well as votes being increased by the ratio of three fifths of the slaves." He had no serious fear of geographical parties. Party of all kinds in excess was fatal, and if the general-ticket system tended to throw the power of the State into the hands of political intriguers, like consequences would result from the district system. As a friend of the administration he opposed the abolition of the substitute election in the House of Representatives.

No discussion of the electoral system in Congress has ever been conducted with more fulness or eloquence or more vigor and brilliancy of argument. When the report came up for final consideration, McDuffie called for a division of the question into two branches. The vote was first taken on the proposition that for the purpose of electing the President and Vice-President the Constitution ought to be amended in such a manner as to prevent the election of these officers from devolving upon Con-

gress. The vote upon this proposition was favorable, being 138 yeas to 52 nays; and among those voting for it was Buchanan. Among those voting in the negative may be noted Daniel Webster, who, singularly enough, never spoke upon any phase of the subject during the lengthy debate. Upon the second proposition, that a uniform system of voting by districts ought to be established, each State to have as many districts as it had Senators and Representatives, and each district to have one vote, the vote was 90 in its favor to 102 against it. Webster voted for it,<sup>1</sup> while Everett and Buchanan voted against it. The failure of this advocacy of the district system is due to complex causes. The large States were unwilling to adopt a system that would divide their strength unless the smaller States would consent to abolish the provision for the House election. Van Buren, in the Senate, had advocated a compromise of this nature. It was assumed in advance of the campaign of 1824 that the election of the following year would take place in the House. The apprehension that an election in the House would be frequent seems to have been widespread. Sectional feeling also played a part in defeating the McDuffie plan. In the midst of the talk about election by the people, there arose in some quarters criticism of that provision of the Constitution which based apportionment in the South not only upon freemen, but three fifths of all other persons. Much that was distasteful both to the North and South was uttered regarding slavery and the representation which the South derived from its slave population. The rapid increase in slave population was

<sup>1</sup> Webster's silent approval of the district system is much dwelt upon by its eulogists. Webster's approval of the Van Buren bill of 1824, which proposed to confer upon the two Houses concurrently the authority to reject the vote of a State, was often urged in the debates of 1876 as a cogent argument in favor of the power of Congress to count the electoral vote. But, so far as I know, there is no speech of Webster's in the records in support of his opinion.

sufficiently alarming to the North, in the augmentation of power it gave the slave States in the House of Representatives, and many were reluctant to make a change that might enhance its influence in the choice of Presidents. In 1800, the black population, upon the admission of Polk in the debate of 1826, furnished eighteen Representatives, and in 1820, but a fraction short of twenty Representatives, from the slave States. It was estimated that at the next census the blacks would furnish one third of the representation from those States. In the light of these facts it is not remarkable that Everett, who always professed his readiness to carry out fairly the compromises of the Constitution, declared himself unwilling to go farther and increase the number of these compromises by a constitutional amendment. The advocacy of the district plan by men like McDuffie, from the Southern States, only served to aggravate the fears of the North. The vote against the district system came also from the partisans of the administration. The passions aroused in the different factions in the canvass of 1824 had not subsided before this question was projected into the arena of the House. McDuffie, who was criticised for his sweeping attacks upon Adams and Clay, "the President and his prime minister," who were "using every effort to prevent the adoption of this proposition to take the election from the House and give it to the people," rescued his motives from aspersion by declaring that he had introduced his motion in the House more than two years earlier, "at a time when nothing short of the gift of second sight could have foreseen the political combinations and events that have since taken place." The amendment was not defeated on its merits. A number of State Legislatures had declared in favor of it, and Hoffman, in answering his colleague Storrs, truthfully said that the great majority of the people of New York, as their opinion could be gathered by debates, news-

papers, speeches, and private conversation, demanded a uniform district system.

In 1824 ~~the~~ electors were chosen by popular vote, by districts and by general ticket, in all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the Legislature. On March 13, 1825, the Legislature of New York established the district system, but not until it had first polled the sentiment of the people by formally submitting the question to them. The answer was so unequivocal as to dispel all doubt of the popular desire for an election by districts. The act provided for the appointment of one of the thirty-four presidential electors in each district by the voters, and authorized the electoral college not only to supply vacancies in its body, but also to appoint two additional electors corresponding with the two Senators from the State in the Senate of the United States. This law, upon the recommendation of Van Buren, then governor, was superseded in 1829 by the law establishing the general-ticket system. In 1828, Delaware and South Carolina alone adhered to the legislative system. After 1832 electors were chosen by general ticket in all the States excepting South Carolina, where the Legislature chose them up to and including 1860. The legislative mode of choice was adopted by Florida in 1868, and by Colorado in 1876, as prescribed by Section 19 of the schedule to the constitution of the State, which was admitted into the Union August 1, 1876.

The abandonment of the district system became inevitable as the few States which had employed it began to realize the disadvantages they suffered in comparison with the States that had adopted the general-ticket system. Since the vote of the State, when cast *in solido*, swung the whole of its electoral strength in favor of the candidate of one party or the other, every other State in which that party was ordinarily dominant would naturally



follow such example and thereby enhance the influence and importance of its leaders in party matters, and add to the prestige of the State itself. States under the control of the opposition could not afford to give their political adversaries such odds as would result from the division of their electoral vote by the continuance of the district system, while their enemies were casting their electoral votes *en bloc*. *Divide et impera* was a maxim of no application to such contests. Hence the rapid adoption of the general-ticket system, which amounts in reality to a poll of States,<sup>1</sup> and in which the voice of the minority is suppressed. One unhappy consequence is the creation in every State of a class of political leaders, often persons occupying no official place, whose influence in achieving party successes has made them potent in party councils and party appointments.

It has been argued by eminent statesmen, among whom is to be counted George F. Edmunds, that the district system of voting for electors is against the spirit, if not the letter, of the Constitution, which intended the appointment of electors to be the act of a State, as a political integer, and not of districts or subdivisions of the State. It was upon this assumption that a bill to elect by districts was defeated in the New York Legislature in 1799. The highest judicial tribunal of the nation,<sup>2</sup> in 1892, by unanimous vote, held such a mode of appointment to be entirely in conformity with the organic law. That case reviewed the validity of a statute of Michigan, passed May 1, 1891, providing for the election of an elector of President and Vice-President in each congressional district of the State and two electors at large, one to be elected in the eastern district and the other in the western district of the State. The court, in upholding the

<sup>1</sup> "The present mode of choosing the President is, though not generally so called, an election by States."—Morton in Senate, 1873.

<sup>2</sup> *McPherson vs. Blacker*, 146 U. S., 1.

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constitutionality of a district system, made the following interesting observations:

"It is insisted that it was not competent for the Legislature to direct this manner of appointment because the State is to appoint as a body politic and corporate, and so must act as a unit, and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the appointment of electors by districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors. . . . If the Legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power . . . it is difficult to perceive why, if the Legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts."

Although, said the court, the Constitution declares

" . . . the people of the several States shall choose the members of Congress (language which induced the State of New York to insert a salvo as to the power to divide into districts in its resolutions of ratification), the State Legislatures, prior to 1842, in prescribing the times, places, and manner of holding elections for Representatives, had usually apportioned the State into districts and assigned to each a Representative; and by Act of Congress of June 25, 1842 (carried forward as § 23 of the Revised Statutes), it was provided that where a State was entitled to more than one Representative the election should be by districts. It has never been doubted that Representatives in Congress thus chosen represented the entire people of the State acting in their sovereign capacity."

The court reviewed the history of the proceedings of the convention of 1787:

"The journal of the convention discloses that propositions

that the President should be elected by 'the citizens of the United States,' or by the 'people,' or 'by electors to be chosen by the people of the several States,' instead of by the Congress, were voted down (Jour. Con. 286, 288; 1 Elliot, Deb. 208, 262), as was the proposition that the President should be 'chosen by electors appointed for that purpose by the Legislatures of the States,' though at one time adopted. (Jour. Con. 190; 1 Elliot, Deb. 208, 211, 217.) And a motion to postpone the consideration of the choice 'by the national legislature,' in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in committee of the whole. (Jour. Con. 92; 1 Elliot, Deb. 156.) Gerry proposed that the choice should be made by the State executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the Legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views by leaving it to the State Legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed. . . . The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."<sup>1</sup>

<sup>1</sup> The late President Harrison is to be numbered among the opponents of the district system. In his message to Congress, December, 1891, he advocated an amendment to the Constitution to prevent such districting of a State as had recently occurred in Michigan. The message read: "All the States have, acting freely and separately, determined that the choice of electors by general ticket is the wisest and safest method; and it would seem that there could be no objection to a constitutional amendment making that method permanent." This overlooks the causes which produced the general-ticket system, and ignores all its defects.

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TABLE SHOWING METHODS OF APPOINTING ELECTORS IN DIFFERENT STATES AT DIFFERENT DATES

| State.              | Appointments<br>by Legislature. | By Districts.   | By General<br>Ticket. |
|---------------------|---------------------------------|-----------------|-----------------------|
| Delaware.....       | 1788-1828                       | .....           | 1832-                 |
| Pennsylvania.....   | 1800                            | 1816, 1820      | 1788-1796             |
|                     | .....                           | .....           | 1804-1812             |
|                     | .....                           | .....           | 1824-                 |
| New Jersey.....     | 1788-1804                       | .....           | 1808, 1816-           |
|                     | 1812                            | .....           | .....                 |
| Georgia.....        | 1788-1800                       | .....           | 1804; 1828-           |
|                     | 1808-1824                       | .....           | .....                 |
| Connecticut.....    | 1788-1820                       | .....           | 1824-                 |
| Massachusetts.....  | 1800, 1808                      | 1788-1796, 1812 | 1804, 1824-           |
|                     | 1816                            | 1820            | .....                 |
| Maryland.....       | .....                           | 1796-1832       | 1788-1792;            |
|                     | .....                           | .....           | 1836-                 |
| South Carolina..... | 1788-1864                       | .....           | 1868-                 |
| New Hampshire.....  | 1788                            | .....           | 1792, 1796            |
|                     | 1800                            | .....           | 1804-                 |
| Virginia.....       | .....                           | 1788-1796       | 1800-1804             |
|                     | .....                           | 1808-1816       | 1824-                 |
| New York.....       | 1792-1824                       | 1828            | 1832-                 |
| North Carolina..... | 1812                            | 1792-1808       | 1816-                 |
| Rhode Island.....   | 1792-1796                       | .....           | 1800-                 |
| Vermont.....        | 1792-1800                       | 1804            | 1824-                 |
|                     | 1808, 1816                      | 1812            | .....                 |
|                     | 1824                            | .....           | .....                 |
| Kentucky.....       | 1792-1796                       | 1800-1824       | 1828-                 |
| Tennessee.....      | .....                           | 1824-1828       | 1832-                 |
| Ohio.....           | .....                           | .....           | 1804-                 |
| Louisiana.....      | 1824                            | .....           | 1828-                 |
| Indiana.....        | .....                           | 1824, 1828      | 1832-                 |
| Mississippi.....    | .....                           | .....           | 1824-                 |
| Illinois.....       | .....                           | 1820, 1824      | 1828-                 |
| Alabama.....        | .....                           | .....           | 1824-                 |
| Maine.....          | .....                           | 1820-1828       | 1832-                 |
| Missouri.....       | .....                           | 1824            | 1824-                 |

The original States are named in the order in which they ratified the Constitution, the others in the order of their admission to the Union.

One evil result of the general-ticket system<sup>1</sup> is its destruction of all incentive to the development of an

<sup>1</sup>“One great objection to the present electoral system is that it absolutely circumscribes the power and the rights of the individual voter. He cannot now vote for the man of his choice for President, but must vote for electors. There may be two sets of electors representing two different parties before the people, but he may not be in favor of either, and would

opposition party organization in States in which one of the two great parties is constantly predominant. The district system or an apportionment system would probably have led to the formation of an antagonistic party and to active political work in districts which seemed to be auspicious fields of operation. In many of the Southern States in the decades preceding the Civil War there was no Whig or Republican organization, because such an organization had no chance of success in the State at large. The educational influence of discussion in district centres was altogether sacrificed and a potent factor against the tyranny of a majority party utterly lost. In a government by discussion (to borrow a phrase from the late Walter Bagehot) social and political development is seriously retarded; the injury which a community thus persistently dominated by one party sustains is almost incalculable. The baneful consequences of the general-ticket system were witnessed in less degree, during the free silver campaigns, in communities where the advocate prefer to cast his vote for a third; yet he has no power to do it. It would be impossible for him alone in the State in which he lives to put candidates for electors in the field who would vote for the man of his choice. That can only be done by an organized party, which may have no considerable vote in the State in which he lives, though it may be strong in other States. As an illustration: In 1856, thousands of men in the Southern States were absolutely deprived of the right of voting for President and Vice-President, because no electoral tickets for Fremont and Dayton had there been put in the field.

"In effect, the electoral system absolutely deprives the voter of his power to vote for men of his choice for President and Vice-President unless there are enough of his way of thinking in the same State to meet in convention and nominate electors to represent their views. Such a system can scarcely be called free or republican. No system deserves that name which does not enable the individual voter to cast his vote for the men of his choice, whether anybody else in the same State votes for them or not. The electoral system makes the convention or caucus indispensable in all cases and everywhere, for the individual voter cannot give effect to his vote, or give to it moral or political significance, unless there are others who will act in concert, that is, in convention, with him in the nomination of candidates for electors."—Morton, from speech in Senate, 1873.

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cates of the gold standard, however numerous, had no chance of exerting a direct influence upon the choice of presidential electors, because they were out-voted by the friends of silver. A system of voting that would permit the expression of minority views, and hence give a more faithful picture of opinion through a State, would have more promptly checked unsound tendencies in finance. Government by majority was never intended to nullify minority sentiment; the general-ticket system not only renders such sentiment inactive, but tends altogether to repress it.

In States in which opposing party organizations flourish and where each is alternately successful, what have been styled the "close" States, the temptation to fraud receives powerful accession under the general-ticket system. Almost every critic of the electoral system has commented upon this obvious danger. A fraudulent ballot cast at a presidential election in New York, said an able writer,<sup>1</sup> in 1873,

"affects thirty-five electors, or nearly one fifth of the whole number requisite to the choice of a President. In Rhode Island such a ballot affects only three electors, or less than one sixtieth of a majority of the whole electoral college. Here is a direct bounty on the concentration of fraudulent efforts of all kinds in the large States, whereby not only a vicious influence of fearful intensity is thrown into the scale of a national election, but all the local elements of corruption, ever sufficiently formidable in our most populous States, are powerfully reinforced";

whereas "under the district system, on the other hand, a fraud upon the ballot box can affect but one elector, unless two electors at-large should be chosen in each State, in which case but three electors at the most could be affected by a given fraud."

It is hard to conceive of a system more easily adapted

<sup>1</sup> Richard H. Dana, Jr., in 117 *N. A. R.*

than the general-ticket system to the successful perpetration of fraud or offering more seductive inducements to its commission. The closer the State, the more bitter is the struggle for party supremacy; the keener the competition for success, the more insidious is the allurements to fraud and the easier its accomplishment, because it is necessary to purchase only a few voters in a particular section carefully chosen as the most promising field of nefarious operations. Thus the system framed by the convention of 1787, as now operated under the general-ticket plan, is doubly vulnerable to the attacks of fraud and corruption. Electors may be bribed. Certainly the electoral system offers leonine temptation to bribery, and the general-ticket plan renders defeat of the popular will by the fraudulent purchase of voters in a close State a simple and easy achievement for astute and dishonest politicians.

The densely populated States, upon the general-ticket system, constantly tend to nullify the vote of the smaller commonwealths. It has several times happened in the history of the nation that the State of New York has been the determining factor in a presidential campaign—the “pivotal” State; in fact, with the exception of the campaigns of 1868 and 1876, no election since 1856 has gone in favor of a party that has not carried New York. The tendency which has been so marked for two generations, and is increasingly evident, towards the concentration of people in large municipalities, will make such States even more influential in the future, their big electoral vote more and more decisive, the temptation to fraud more seductive, and the profit from its successful perpetration more certain. The smaller States in self-defence should co-operate to bring about the adoption of a juster system. If their influence is to be preserved, their remonstrance against the present method should be emphatic. New York to-day wields thirty-nine electoral

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votes, which is the equivalent of thirteen of the smallest States, and if, under the system at present in vogue, a transferred vote of five to six hundred will place it in the Democratic or the Republican column,—and no greater change would have taken the State from Cleveland and given it to Blaine in 1884,—the incentive to prostitution and abuse of the suffrage could not be rendered stronger; and even in an ideal community, where the purity of the ballot-box is untarnished, the vote of the big State, like that of the large stockholder, counts rather in a geometrical than an arithmetrical progression. A plurality or majority in one section may, it is true, at times be counteracted by one in another section, and thus the net result be a rude approximation to fairness, taking the country as a whole; but this theory of averages may not work constantly, and the steady suppression of minority conviction in a State is an undisputed evil.

The extent to which, under the general-ticket system, the populous States become decisive factors in a presidential election, and the minority is silenced, may easily be illustrated by examples selected since the rise of the national-convention system. This also coincides with the general adoption of the general-ticket system. In 1832 Jackson's popular vote was 687,502, his electoral vote 219 out of a total of 288. Clay's popular vote was 530,189, while his electoral vote was only 49. In other words, Jackson had seventy-six per cent. of the electoral vote and only fifty-five per cent. of the total popular vote. Jackson carried New Jersey with its eight electoral votes. While the result would have been unaffected had the State gone to Clay, Jackson's vote was 23,856; Clay's 23,393; in other words, the eight electoral votes of New Jersey were swung by the narrow margin of 232 voters.

In 1836 the popular vote for Van Buren was 762,698, his electoral vote 170 (including three from Michigan, counted in the alternative) out of a total of 294. William



Henry Harrison had a popular vote of 549,567, but only 73 electoral votes. Van Buren had fifty-seven and seven tenths per cent. of the electoral vote, fifty-two and nine tenths per cent. of the popular vote. Van Buren carried Connecticut, with its eight electoral votes, by a plurality of 542 out of a total vote of about 38,000. In 1840 General Harrison had a popular vote of 1,275,016, with 234 electoral votes out of a total of 294; while Van Buren had a popular vote of 1,128,702, and an electoral vote of 60. Thus, while Harrison, taking Birney's vote of 7069 into consideration, had only a little over fifty per cent. of the popular vote, he had more than seventy-nine per cent. of the electoral vote.

In Maine, which had ten electoral votes, Harrison had a popular vote of 46,612, Van Buren of 46,201; in Pennsylvania, which had thirty electoral votes, Harrison had 144,021, while Van Buren had 143,672. In Michigan, which had three electoral votes, Harrison had 22,933, Van Buren 21,131. Thus forty-three ballots in the electoral college were controlled by less than thirteen hundred votes. Conditions in 1844 were extraordinary, for Birney and the Conscience Whigs defeated Clay. Polk's popular vote was 1,337,243, his electoral vote 170 out of 275; Clay's popular vote was 1,299,068, his electoral vote 105. Polk had less than fifty per cent. of the popular vote and about sixty-two per cent. of the electoral vote. Birney polled in the State of New York 15,812 votes, all or nearly all drawn from the ranks of the Whigs. Clay's vote in New York was 232,482, Polk's 237,588. The Conscience Whig defection gave the State to Polk; without it, his electoral vote would have been 134, and Clay's, with it, would have been 141. Birney's vote the country over in 1840 was 7069, in 1844, 62,300,<sup>1</sup> and, as

<sup>1</sup> Blaine gives Birney's vote in 1844 as 58,879. Authorities differ regarding some of the figures, but the differences are too slight to vitiate or even affect my argument.

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Blaine says, "was very largely at the expense of the Whig party, and its specific injury to Mr. Clay is almost a matter of demonstration." Had the district or the apportionment system been in vogue in New York, Clay, even with the Birney vote against him, would probably have received a majority of the electoral ballots of the State.

Taylor's total popular vote throughout the country in 1848 was 1,360,099, the vote for Cass was 1,220,544, for Van Buren 291,263. Taylor had less than forty-eight per cent. of the total vote. Taylor had 163 votes in the electoral colleges, Cass 127, the total electoral vote being 290, Taylor's percentage of the electoral vote being fifty-six and four tenths per cent. Van Buren had ten per cent. of the popular vote, but not a single electoral vote; yet three of his supporters were elected to the House of Representatives.

Pierce received from the people a total of 1,601,474 votes, Scott 1,386,580, Hale 156,147; Scott, while receiving only one sixth as many electoral votes as Pierce, received five sixths as many votes at the polls. Adding the vote of Hale, it will be observed that out of a total exceeding three millions, Pierce's absolute majority was but 58,747. Pierce received 254 electoral votes out of a total of 296, Scott having only 42; in other words, Pierce had eighty-five per cent. of the electoral vote, but only fifty-one of the popular vote. Although Scott carried only four States, with an aggregate electoral strength of 42 votes, his popular vote was only 215,000 behind Pierce.

In 1856 Buchanan received at the popular election 1,838,169, Fremont 1,341,264, and Fillmore 874,534 votes. The total vote in the electoral colleges was 296, of which Buchanan received 174, Fremont 114, Fillmore 8; Buchanan had forty-five per cent. of the popular vote and fifty-nine per cent. of the electoral vote; and Fill-

more, who had twenty-five per cent. of the popular vote, had only three per cent. of the electoral vote. Fourteen of his supporters were elected to Congress, which shows to what extent under the existing system the vote for him was nullified.

The results in 1860 are astonishing. Douglas, the champion of "popular sovereignty," or "squatter sovereignty," as it has been indiscriminately termed, carried only two States, yet his popular vote reached the enormous figure of 1,376,000, only about 500,000 behind Lincoln, who carried all the Northern States except the two that supported Douglas. Lincoln's popular vote was 1,866,452, that of Douglas was 1,376,957, of Breckenridge 845,763, of John Bell 589,581. There were 303 votes in the electoral colleges, distributed as follows: To Lincoln, 180; Douglas, 12; Breckenridge, 72; Bell, 39. Douglas, with a popular vote much larger than that of Breckenridge, had only one sixth of the latter's vote in the electoral colleges, and, while he had two and a half times as many votes as Bell, had less than one third of Bell's electoral vote. Lincoln had forty per cent. of the popular vote and fifty-nine per cent. of the electoral vote. While he had only a minority of the popular vote in New Jersey he had four out of its seven electors.

"In proportion to the popular vote Lincoln should have had 121 electors; Douglas, 89; Breckenridge, 55; Bell, 38. If there had been a slight diversion of votes from Mr. Lincoln in certain States, the election would have been sent to the House of Representatives, which body must have been confined in its choice to the three candidates highest in electoral vote, and Douglas would have been excluded, although second highest in popular vote."<sup>1</sup>

A frightful crisis might have been precipitated if all the four candidates had obtained an equal electoral vote.

<sup>1</sup> Senator Charles R. Buckalew, of Pa. 124 *N. A. R.*, 163, 164.

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The duty of electing would have devolved upon the House, and yet the House could not have proceeded to exercise its constitutional function, unless one of the candidates had withdrawn from the contest. Such a case was, plainly, never contemplated by the framers of the Constitution. The same utter prostration of government might have occurred had Breckenridge and Bell had an equal number of electoral votes, and both Lincoln and Douglas failed of a majority. There would then have been four candidates morally entitled to be voted for in the House, but that body would have been palsied from lack of constitutional power to vote for more than the three highest on the list.

In 1864, when the nation was battling for the right to live, Lincoln received 2,216,067 of the suffrages of his fellow-countrymen, while McClellan received 1,808,725. The total electoral vote, including the vote from the unreconstructed States, was 314, of which Lincoln had 212 and McClellan only 21.<sup>1</sup> Of the popular vote Lincoln had fifty-five per cent., and of the electoral vote cast, ninety-one per cent. In 1868 the popular vote for Grant was 3,012,833, for Seymour 2,703,249; nevertheless, Grant had 214 electoral votes and Seymour only 80. The total was 317, with 23 votes not counted from Southern States. Grant had fifty-two per cent. of the popular vote and seventy-three per cent. of the electoral vote. In 1872 Grant received a popular vote of 3,597,132, and had 286 electoral votes; Greeley had a popular vote of 2,834,125, but, as his death occurred before the assembling of the electoral colleges, none of the electors voted for him, except three in the Georgia college. Grant's percentage of the popular vote was fifty-five; of the electoral vote eighty-four.

Senator Morton, in the Senate, on December 11, 1876,

<sup>1</sup> One of Nevada's three electors died before the popular election; hence the state cast only two electoral votes.

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after presenting a tabulation showing the disparity between the percentage of the popular vote and of the electoral vote for the successful candidate at the elections occurring between 1844 and 1872, read from a compilation as follows:

"To illustrate the operation of the district system, we will consider the comparative results of the election for President and for members of Congress, in the four States of Pennsylvania, Ohio, Indiana, and Illinois, from 1860 to 1872.

"These States voted solidly for Mr. Lincoln in 1860, casting seventy-four electoral votes. At the same election they returned sixty-six members of Congress, of whom twenty-four were Democrats.

"In 1864 the same States cast seventy-six electoral votes for Mr. Lincoln again, and elected the same year sixty-eight members of Congress, of whom sixteen were Democrats.

"In 1868 the same States threw seventy-six electoral votes solidly for General Grant and elected sixty-eight members of Congress, of whom twenty-two were Democrats.

"In 1872 the same States voted solidly, giving eighty-five electoral votes to General Grant, and elected seventy-seven members of Congress, of whom twenty-five were Democrats.

"In these four States the Democratic strength, as compared with the Republican, has been about nine to ten, but under the operation of the general-ticket system they have been wholly unrepresented in the electoral colleges; but in the House of Representatives under the district system, they have had an average of nearly one third of the members.

"Take the State of New York alone for the same period. In 1860 New York cast her thirty-five electoral votes solidly for Mr. Lincoln. At the same time she elected thirty-three members of Congress, of whom nine were Democrats.

"In 1864 she again cast her thirty-three electoral votes solidly for Mr. Lincoln, and at the same time elected thirty one members of Congress, of whom eleven were Democrats. In 1868 she cast her thirty-three electoral votes solidly for Mr. Seymour. The State was carried for Mr. Seymour by his

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overwhelming majority in the city of New York, about the character of which grave charges were made, but of which the committee expresses no opinion; but the rest of the State, unaffected in their districts by this large majority in the city, returned eighteen out of the thirty-one members of Congress who were opposed to Mr. Seymour, thus showing conclusively how the voice of the people of New York outside of the city had been stifled in the presidential election by the city majority, operating through the general-ticket system. In 1872 New York cast her thirty-five electoral votes solidly for General Grant, at the same time electing thirty-three members of Congress, of whom nine were Democrats."<sup>1</sup>

The disputed election of 1876 shows some interesting results. The popular vote for Hayes was smaller than for Tilden, whether the Republican or the Democratic count be accepted. The total Republican count was as follows: Tilden, 4,285,992; Hayes, 4,033,768; Peter Cooper (Greenback), 81,737; Green Clay Smith (Prohibitionist), 9522. The Democratic count gave Tilden 4,300,590; Hayes 4,036,298. The Republican count in Florida gave Tilden 22,927, Hayes 23,849; the Democratic count showed Tilden 24,434, Hayes 24,340. It is clear from either canvass that the State's four electoral votes were controlled by a very few voters. In Louisiana the differences between the Hayes and the Tilden votes were much larger, whichever figures be taken, Democratic or Republican. In Oregon the vote for the Hayes electors averaged 15,206, for the Tilden electors 14,149, and the probability would seem to be that had the election taken place in districts, Tilden would have had at least one district. In South Carolina the Hayes vote was 91,870, the Tilden vote 90,896, or a difference of 974, showing that a change of 488 votes would have given the State

<sup>1</sup> This quotation also appears in the last article written by Morton on the electoral system, which was published in the *North American Review*, July, 1877.

undeniably to Tilden. California's six electoral votes were carried by a plurality for Hayes of 1854 votes out of a total of 154,834. Connecticut's six votes went to Tilden, although the total vote was close, Tilden having 61,934 and Hayes 59,034.

In 1880 Garfield's popular vote was 4,454,416, Hancock's 4,444,952. Garfield had about forty-nine per cent. of the total popular vote, but fifty-eight per cent. of the electoral vote, having 214 out of a total of 369 in the electoral colleges. Both the leading candidates ran remarkably close in California, Garfield having 80,348 and Hancock 80,426, and in Oregon, where Garfield had 20,619 and Hancock 19,948. Garfield's vote in New York State was 555,544, Hancock's 534,511. While Garfield carried the State by over 21,000 plurality, the whole electoral contest hinged upon New York, for the votes of the State, if subtracted from the Garfield list and added to the Hancock list, would have elected the latter. Garfield's plurality represented less than two per cent. of the State's total vote. The vote in California was exceedingly close, Hancock leading Garfield by only 78 votes in the entire State. But in the congressional election of the same year the Republicans and the Democrats each secured two Congressmen in California, and in New York, where Garfield exceeded Hancock by about 21,000 votes, the Democrats that year obtained fourteen Congressmen and the Republicans nineteen.

Another forcible illustration, not only of the weight of the vote of the State of New York as an electoral fact, but of the injustice of the general-ticket system, is furnished by the election of 1884.<sup>1</sup> The popular vote for Cleveland was 4,874,986, for Blaine 4,851,981; yet, despite the closeness of the popular figures, Cleveland had 219 electoral votes and Blaine 182, out of a total of 401.

<sup>1</sup> It must be understood that this is a criticism of electoral methods, and not an expression of regret at the outcome of the election.

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The ratio of Cleveland's popular vote is less than fifty per cent. ; of his electoral vote fifty-five per cent. New York State gave Cleveland 563,154, and Blaine 562,005. The difference in their votes was 1149. Had 575 citizens who voted for the Cleveland electors voted instead for the Blaine electors, the whole electoral weight of New York (thirty-six votes) would have oscillated to the Republican side. Each one of the electoral votes of the State was controlled by sixteen voters!

In 1888 a presidential candidate having a minority vote was again successful. Of the popular vote Harrison received 5,439,853, Cleveland 5,540,329; yet Harrison had 233 votes in the electoral college and Cleveland only 168, out of a total of 401. Thus Harrison had about forty-eight per cent. of the aggregate popular vote, but fifty-eight per cent. of the electoral vote. The vote in Indiana was close, but not decisive. Harrison had 263,361, Cleveland 261,013. The Republican vote for Congressmen in that State that year was 265,365, the Democratic 259,987,—a difference of 5378 in the Republican favor. Upon a vote closely approximating that cast by the same party for presidential electors, the Democrats elected ten Congressmen and the Republicans three. In 1892, Cleveland and Harrison were again the candidates of the two great parties, Cleveland receiving a popular vote of 5,556,543 and Harrison 5,175,582, Weaver, the candidate of the Populists, receiving 1,040,886. Cleveland's percentage of the vote polled by all the candidates is forty-eight. In the electoral college there were 417 votes, 277 for Cleveland, 145 for Harrison, Weaver 22, Cleveland's percentage of these being sixty-six. In 1896, the year of the free-silver campaign, McKinley's popular vote was 7,111,607, Bryan's 6,509,052. McKinley's plurality over Bryan was 602,555, and his majority over all the candidates opposed to him was 106,874. In the electoral colleges, out of a total of 447,



McKinley received 271, Bryan 176. Thus McKinley had nearly sixty-one per cent. of the electoral vote, and a little over fifty per cent. of the popular vote. The free-silver episode seriously affected the vote of California. McKinley received 146,688, Bryan 144,766; yet with this strikingly close vote eight electoral ballots were cast for McKinley and one for Bryan! In Kentucky, McKinley's vote also slightly preponderated over Bryan's, McKinley receiving 218,171, Bryan 217,890; yet McKinley had twelve of the electoral votes of the State and Bryan one! It is hardly imaginable that with a similar division of the popular vote in California and Kentucky, under the district system or the apportionment system, the electoral votes would not have been very differently apportioned. In 1900 McKinley's popular vote was 7,206,677, Bryan's 6,374,397, McKinley again having a majority over all his opponents, for the total vote was 13,970,240. The number of votes in the electoral college was the same as in 1896, but of these McKinley, in 1900, had 292, Bryan 155. McKinley, with a little over fifty per cent. of the popular vote, had over sixty-five per cent. of the electoral vote.<sup>1</sup> The only comparatively close vote was in Idaho, Kentucky, and Utah; in Idaho the McKinley vote was 27,198, the Bryan vote 29,646, giving the Democratic candidate the three electoral votes of the State. In Kentucky, where party strength had been remarkably equal in 1896, the Republican vote was 227,128, the Democratic 235,103, showing a slight shifting of sentiment in favor of Democratic doctrines since 1896, but all of Kentucky's thirteen electoral votes being polled in the

<sup>1</sup> At the election of 1900, a recent writer says, "in Boston about 6300 voters voted for one presidential elector, because they did not understand how to manipulate the ballot. . . . In New York city, 1088 citizens lost their vote on presidential electors by failing to mark their ballots correctly."—"Prest. Votes—A Study of," 16 *Pol. Sci. Q.*, 63.

Under the general-ticket system such errors might decide the vote of a State, and determine the result of an election.

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Democratic column. In Utah the Republican plurality was 2,133, the McKinley vote being 47,139, the Bryan vote 45,006.

In 1904 the popular vote reached the enormous total of 13,528,979, the total of the vote for President Roosevelt being 7,624,489, for Parker 5,082,754. President Roosevelt's wonderful popularity is shown in his great plurality over Judge Parker of 2,541,635. His majority over all his opponents was 1,729,809. His percentage of the total popular vote was fifty-six; of the electoral vote seventy. The only State where the vote was remarkably close was Maryland, where Parker had 109,446, Roosevelt 109,497. Twenty-six popular votes would have metamorphosed the electoral vote of that State, but the change would not have affected the general result. Although such an extraordinary popular tribute to and expression of confidence in a presidential candidate is unparalleled in our history, excepting in Washington's case, the electoral vote so far outruns the popular as to confirm the conclusions herein reached. Had the electoral corresponded with the popular vote, Roosevelt's vote in the electoral colleges would have been 268 instead of 336.<sup>1</sup>

John Quincy Adams, the presidential candidate elected in the House of Representatives in 1825, was a minority candidate; a fact that gave rise to numerous efforts, both on the part of his successor in that office and of Benton, Gilmer, and others, to bring about an amendment of the Federal Constitution providing for the election in districts and abolishing the alternative election in the House of

<sup>1</sup> Roosevelt's astonishing success is tempered by the fact that, while he received about 418,000 more votes than were cast for McKinley in 1900, there was an enormous loss in the Democratic vote, only explicable upon the theory that numerous Democrats failed to exercise the electoral franchise. The total vote of the country was 442,000 less in 1904 than in 1900. The percentage of voters to population, which was 1 to 5 in 1896, fell to 1 to 5½ in 1900, and then dropped to 1 to 6½ in 1904.

Representatives. Since that day there have been seven Presidents elected by a minority of the whole people,—Polk, Taylor, Buchanan, Lincoln, Hayes, Garfield, and Benjamin Harrison. Polk's vote was 24,000 less than that of his adversaries combined. Owing to the heavy vote polled by Van Buren, the candidate of the Free Soilers in 1848, Taylor had 151,000 votes less than all the other candidates. Buchanan, in 1856, fell short of all his opponents by 377,000. Lincoln's vote in 1860 was 354,000 less than the combined vote of Breckenridge, Douglas, and Bell. Hayes was in a popular minority, in 1876, of nearly 250,000, Garfield in like minority of 308,000 in 1880, and Harrison, in 1888, fell short of his opponents by nearly 500,000. A minority President is as constitutionally President as an executive receiving a majority of the popular vote. The country has long been accustomed in State and local elections to a choice of officials by a plurality vote. But there was an adumbration of truth in the criticisms of Benton, Jackson, and Dickerson upon the artificial electoral system under which Presidents having a majority of the electoral vote but a minority of the popular vote were chosen. To a minority President selected upon the apportionment plan there can, I think, be no valid objection.

Three times has a candidate having a smaller popular vote than his leading rival been successful in attaining the presidency. John Quincy Adams was such a minority candidate in 1824, and Hayes was such in 1876. In 1888 Benjamin Harrison carried twenty States and had 233 electoral votes, although Cleveland had the votes of 100,000 more of his fellow-citizens than had Harrison.

One of the most anomalous cases is the vote for Douglas in 1860. Douglas carried only New Jersey and Missouri, yet his vote was over 500,000 more than that of Breckenridge, who carried the solid South, and was hardly 500,000 less than Lincoln's, who carried seventeen

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States, with 180 electoral votes. Evidently the Douglas leaven had permeated the entire North. Bell won in the three border States, Virginia, Kentucky, and Tennessee. The Lincoln-Douglas vote divided the North, but had little or no significance in the South. Viewed as an expression of the conflict of Northern sentiment as to the proper method of dealing with the question of slavery extension it shows that, among 3,200,000 Northern voters, the division of opinion was in the proportion of about  $\frac{2}{3}$  against extension into the new Territories, to  $\frac{1}{3}$  in favor of permitting the Territories to decide the question for themselves when they should become States.

The policy of Lincoln and the war Congresses is commonly supposed to have been triumphantly vindicated in 1864, for Lincoln had 212 electoral votes, from twenty-three States, while McClellan got only 21 electoral votes, from three States. The popular vote for Lincoln in 1864 was 2,216,067, and the vote for McClellan, upon a platform which declared the war a failure, was 1,808,725, a difference of 408,342 in a total vote of a little over 4,000,000. Even in the midst of a civil war for the perpetuation of the Union, if the vote be an index of convictions, Union sentiment was only slightly preponderant, for about forty-five per cent. of Northern voters seem to have been ready to agree to a permanent separation of the States.

In 1848 Taylor and Cass each carried the same number of States, but, as pointed out above, New York was given to Taylor by Van Buren's presence in the field. Once since then have the States been evenly divided between the candidates of the two great parties. This was in 1880, when Garfield and Hancock each got nineteen States; but Garfield's nineteen carried much greater weight in the electoral college. Had Hancock succeeded in wresting New York from the Garfield column he would have become Hayes's successor in the presidential office.

In the election of 1880 the popular vote for the two candidates most nearly approximated equality.

Third tickets have never played much of a rôle in politics except during the struggles over slavery extension. The vote for Birney in 1844 defeated Clay, as Seward argued to Whig audiences that it would surely do. Seward called third-party voting "guerilla warfare," and such it has usually proved, but it was most effective "guerilla warfare" in 1844. The vote for Fillmore in 1856 seemed to augur the formation of a new party. The American party symbolized an attempt to construct an organization which should ignore the slavery question,—the burning question of the day,—and it met the fate of all inopportune compromises. It was not possible to ignore this question or to build a party upon the narrow creed of excluding foreigners from office. In the State elections of 1857 the party suffered a complete rout, great numbers of its members going over to the Republicans, and all that was vital of it was soon confined to the border States, where obviously the disposition to silence regarding slavery was most marked. The Constitutional Union party of 1860 was its legitimate successor, but with the issues of the Civil War the extinction of the latter party was rapid and entire.

After the Civil War and the settlement of the slavery question, no third organization polled any substantial vote until 1892, when the People's party, out of a total vote of 12,154,517, polled 1,122,045, or nearly ten per cent. As a national organization, the Prohibitionists might almost as well disband, for their vote is too slight to warrant the belief that their creed will ever figure in national politics. The vote of the Socialistic party in 1904, which is much smaller than the Populistic vote of 1892, and represents an even smaller percentage of the total vote, indicates no probable ascendancy of its principles, unless that party eventually fuses with one or the

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other of the two leading organizations. The most impressive fact is the numerical resemblance between the votes of the two great parties. The natural effects of this close approximation are not fully felt, because under the general-ticket system the electoral result is widely different. Before the projection of the slavery question into the arena of national politics—when parties were forming upon the issue of arresting its extension into new Territories—the divergence between the total vote for each of the leading candidates was slight, denoting how evenly party lines may be drawn. During the Civil War and the reconstruction period there was a marked increase in the Republican majority, owing to the intensity of political excitement, but this increase would have disappeared if a vote had been given to the Southern States, which, upon one theory, were in the Union all the while they were battling to destroy it. With the restoration of these States to their old places the same close approximation of rival votes has reasserted itself. The only extraordinary departure from the normal is the vote of 1904, due in great degree to the ascendancy which the President's personality has gained over the popular mind.

One inference from these election figures which sharply obtrudes itself is that the two great political organizations have a powerful hold upon the convictions of our fellow-citizens, and that those who hope to bring about a new alignment must reckon with agencies to compare in potency only with the forces of nature. The lines of cleavage have been established for more than a century. Crystallization has taken place about the two opposite poles of strict construction and liberal construction of the Constitution, and nothing less than a political convulsion able to shake the whole fabric to its centre would release the atoms from the control by which party traditions and associations hold them. The two chief party organizations have somehow shot their roots down into the very

hearts of the citizens of this country. They are not parasitic, and it is futile to think of seriously changing these basic adjustments, without the lapse of a great period of time, except through some political cataclysm. The outlook in the near future for some third-party organization which shall displace one of the two great parties of the present day is unpromising indeed. In politics men are as conservative as in religion, perhaps more so. By education, traditions, associations, they are so inseparably wedded to party, that not even when the nation is in an agony for its existence will they, in any great degree, ignore party attachments. But the salvation of the country lies in this conservatism. If great masses of voters could suddenly forget party affiliations, be detached from old connections and become the sport of all sorts of political forces,—demagogic, socialistic, aristocratic, or other,—the outlook for free government would be sombre indeed.

So great is the strength of party attachment, the roots of party sentiment run so deep, that it would be foolish to propose any amendment that should fail to take account of them. Government by discussion is best and most efficiently conducted along party lines, whether parties should be permanent or only temporary, as M. Ostrogorski believes. Party government is an indispensable factor of our institutional political progress. One cardinal fault in propositions to amend the electoral system is in the defective philosophy that has sought to abolish parties. The Constitution need not in terms recognize them any more than it recognizes their conventions or their machinery, but no amendment can ever be passed which might forbid or even hamper their activity or impede the natural institutional development of the American people.

This study of the methods that have been employed by the State Legislatures in the appointment of electors

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shows the eminent desirability of a uniform system. The evils of the general-ticket system become more and more potent and alarming. Although they were graphically depicted in 1826, in the report of Benton's committee to the Senate and of McDuffie's committee to the House, it was not possible then to appreciate the mighty force wielded by a great State in crushing the opposition of a dozen smaller commonwealths. Dickerson, of New Jersey, in 1824, thought it a dangerous portent that in an election by electors six great States might control the election and completely nullify the power or influence of eighteen others; to-day one great State exercises far more influence, for its decision may involve the destinies of all forty-five. The general-ticket system is at present universal, but the control over the method of appointment which the present Constitution gives to the States may result in future diversity. It cannot be foreseen what powerful impulsions may hereafter arise to cause some State Legislature to disfranchise the people and revest itself with the power of appointment or confer it upon some small coterie, "the directors of a bank," or some other board or body which shall thus speak the voice of the State. Uniformity can be permanently assured only by an amendment to the national Constitution. A constitutional provision fixing territorial units for electoral votes or apportioning the electoral vote of a State in the ratio of its popular vote among the different candidates would have prevented many of the numerous factional and party struggles so common in earlier history, the aim of which was so to control electors by skilfully timed changes in the mode of appointment as to subserve the interests of individuals and organizations. Time has also shown the force of some of the objections urged against the district system. The device of the "gerrymander," as Senator Edmunds, and only a few years ago, said, is being more and more employed, both in



respect of congressional representation and in the election of State Legislatures.<sup>1</sup> While the district system, properly safeguarded, would insure minorities some degree of representation, lessen fraudulent voting, and aid in awakening opposing parties within a commonwealth, no system yet suggested would achieve these ends so completely as would the apportionment system.

<sup>1</sup> "Perils of our National Elections," 12 *Forum*, 691. The article gives a picture of the redistricting of Alabama, February 13, 1891.

## CHAPTER XII

### AMENDMENTS OFFERED IN CONGRESS RELATIVE TO THE ELECTORAL SYSTEM

THE first twelve amendments to the Federal Constitution were added within fifteen years after it went into operation. No changes have since been made and no additions effected excepting those which were the outcome of the Civil War. The demand for amendment was strong in the first quarter of the last century, but either the conservative spirit was too potent or there was a lack of agreement as to the form which the change should assume. No less than one hundred and fifteen amendments, according to McMaster, were proposed in either House of Congress in the decade between 1810 and 1820. The ruling ideas underlying these amendments, says that historian, included the choice of Representatives and presidential electors in districts, shorter terms for Senators, the appropriation of public moneys for the building of roads and canals, the bestowal upon Congress and the States of concurrent powers to train the militia, the withdrawal of the President's right of veto—many of these propositions, as he says, representing but the passing notions of the hour. The length of the term of the executive, the manner of choosing him, his eligibility to frequent re-election, were, says the same writer, the causes of seventy-five propositions to amend the Constitution between 1820 and 1830. "A single term, a direct popular vote, and the exclusion of members of Congress from offices within the gift of the President

were the popular political ideas." Allusion has already been made to the amendment offered by Pickens, of North Carolina, in 1813 and in 1816. Benton labored intermittently for twenty years to abolish the electoral system and to secure a choice of President and Vice-President in congressional districts. During the years immediately prior to 1824 many of the States by legislative resolution expressed their disapproval of the existing method of electing the President and Vice-President. Inasmuch as political conditions indicated that there would be several presidential candidates, no one of whom might obtain a majority of the electoral vote, and that the election might therefore devolve upon the House of Representatives, a number of amendments were proposed in the Senate and the House in 1823, but none received the constitutional vote requisite for its submission to the Legislatures of the various States. The authors of these amendments were men enjoying a high reputation as statesmen and deeply impressed with the evils of the existing method and the importance of substituting a better system.

Benton's first effort was made December 11, 1823, when he introduced in the Senate a resolution for an amendment abolishing the electoral office and providing for a direct vote by the people. His plan contemplated that each State should be divided into electoral districts, the voters to vote "in their own proper persons" for President and Vice-President; the person receiving the greatest number of votes for President or Vice-President for any district was to count one vote for such office respectively; the returning officers were to decide in case of a tie in any district, and if no candidate was found to have a majority of all the electoral votes, the House of Representatives was to choose the President and the Senate the Vice-President. In his *Thirty Years' View* he quotes freely from a speech delivered by himself in the Senate on Feb-

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ruary 3, 1824, in support of his proposition. He advocated the establishment of a uniform system throughout all the States. The district system would give to every portion of the Union its due share in the choice of the chief magistrate; the people of each district would be governed by its own majority, and not by a majority existing in some other part of the State; it would introduce a plan agreeable to the interests of the different sections of a commonwealth in which ideas might prevail different from those predominant in other sections, and a plan agreeable to the intention of the Constitution, which was "to give to each mass of persons entitled to one elector the power of giving an electoral vote to any candidate they preferred." He explained how both the general-ticket system and a legislative ballot violated the rights of minorities, because "a majority of one in either case carries the vote of the whole State." Objection to a direct vote of the people had a weight in 1787 to which it was not entitled in 1824. The danger of tumults and violence, which so alarmed the fathers, was purely fanciful. Intermediate electors were the favorite institution of aristocratic republics and elective monarchies, whereas "a direct vote by the people is the peculiar and favorite institution of democratic republics." Time and experience, the only infallible tests of good or bad institutions, had, he declared, shown that

"the continuance of the electoral system will be both useless and dangerous to the liberties of the people and that 'the only effectual mode of preserving our Government from the corruptions which have undermined the liberty of so many nations is to confide the election of our chief magistrate to those who are farthest removed from the influence of his patronage,'<sup>1</sup> that is to say, to the whole body of American citizens."

<sup>1</sup> Report of a committee of the House of Representatives upon Mr. McDuffie's proposition.

On December 16, 1823, Mahlon Dickerson, of New Jersey, and on December 29th of the same year Martin Van Buren, of New York, introduced separate amendments in the Senate, each of which required that electors should be chosen in districts. Dickerson proposed in the case of a tie vote to leave the choice of President to the two Houses in joint session, thus reviving an idea which had found supporters since it was first broached by Nicholas and Gallatin in 1800. The Van Buren amendment proposed, in the first instance, that if there were no majority choice by the electors, instead of immediately referring the election to the House the electors should at once be reconvened by executive proclamation to choose between the candidates having an equal number of votes, and, if they failed to choose, the final choice in case of another tie was to be made, as at present, by the House of Representatives.

On December 22, 1823, almost concurrently with the presentation of these amendments to the Senate, George McDuffie, of South Carolina, chairman of a select committee on the subject, proposed an amendment in the House of Representatives providing for the choice of electors in districts to be fixed by the State Legislatures or, in case of their failure to act, by Congress. His plan required the president of the Senate by proclamation to reconvene electors to make choice between the leading candidates in case of a tie, but if this should not result in an election the two Houses of Congress, voting individually and not as States, were to choose the President. If no choice was made on the first ballot the lowest candidate on the list was to be dropped at each successive ballot until only two remained. If finally there were a tie, the candidate having the highest vote at the first meeting of the electors, or if there were none such, then at the second meeting of electors, was to be chosen President. If the reconvened electors failed to choose, the

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two Houses were to continue balloting until a President should be chosen. The Vice-President was to be chosen by the same means by the Senate in case of a tie. McDuffie's plan provided for opening and counting the votes as at present. It was debated but never acted upon. McDuffie, as has been told, in December, 1825, offered for consideration two resolutions, which were referred to a committee of the whole on the state of the Union. These resolutions were that, for the purpose of electing the President and Vice-President, the Constitution should be so amended that a uniform system of voting by districts should be established in all the States; and that a further amendment should be made to prevent the election of these officers from devolving upon the respective Houses of Congress. The fate of these resolutions has already been recounted.

The amendments proposed in the winter of 1823-24 were not of fortuitous origin, but sprang from a sentiment that the constitutional method would not work satisfactorily in the election of 1824. As early as February 14th of that year a caucus assembled in the chamber of the old House of Representatives and nominated William H. Crawford to the office of President and Albert Gallatin to that of Vice-President. In the preceding summer George Hay had submitted to Madison, the veteran member of the convention of 1787, a form of amendment of which some account may be gleaned from Madison's reply to that gentleman August 23, 1823. To those whose veneration for the Constitution is almost fetichistic, the opening sentences of Madison's letter may be commended as convincing proof that the convention in its provisions touching the electoral system was not "inspired." Madison wrote:

"The difficulty of finding an unexceptionable process for appointing the executive organ of a government such as that of

the United States was deeply felt by the convention; and as the final arrangement of it took place in the latter stage of the session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such bodies, though the degree was much less than usually prevails in them."

Of the plan submitted to him by Hay, Madison said:

"But with all possible abatements, the present rule of voting for President by the House of Representatives is so great a departure from the republican principle of numerical equality, and even from the Federal rule, which qualifies the numerical by a State equality, and is so pregnant, also, with a mischievous tendency in practice, that an amendment to the Constitution on this point is justly called for by all its considerate and best friends.

"I agree entirely with you in thinking that the election of presidential electors by districts is an amendment very proper to be brought forward at the same time with that relating to the eventual choice of President by the House of Representatives. The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted; and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the States which had set the example. A constitutional establishment of that mode will doubtless aid in reconciling the smaller States to the other change, which they well regard as a concession on their part. And it may not be without a value in another important respect. The States, when voting for President by general ticket, or by their Legislatures, are a string of beads; when they make their elections by districts, some of these differing in sentiment from others, and sympathizing with that of districts in other States, they are so knit together as to break the force of those geographical and other noxious parties which might render the repulsive too strong for the cohesive tendencies within the political system.

"It may be worthy of consideration, whether, in requiring

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elections by districts, a discretion might not be conveniently left with the States to allot two members to a single district. It would manifestly be an important proviso that no new arrangement of districts should be made within a certain period previous to an ensuing election of President.

"Of the different remedies you propose for the failure of a majority of electoral votes for any one candidate, I like best that which refers the final choice to a joint vote of the two Houses of Congress, restricted to the two highest names on the electoral lists."

Madison's letter then proceeded to outline his own ideas:

"Having thus made the remarks to which your communication led, with a frankness which, I am sure, you will not disapprove, whatever errors you may find in them, I will sketch for your consideration a substitute which has occurred to myself for the faulty part of the Constitution in question:

"The electors to be chosen in districts, not more than two in any one district, and the arrangement of the districts not to be alterable within the period of ——— previous to the election of President. Each elector to give two votes, one naming his first choice, the other his second choice. If there be a majority of all the votes on the first list for the same person, he of course to be President; if not, and there be a majority (which may well happen) on the other list for the same person, he then to be the final choice; if there be no such majority on either list, then a choice to be made by joint ballot of the two Houses of Congress from the two names having the greatest number of votes on the two lists taken together.' Such a process would avoid the inconvenience of a second resort to the electors, and furnish a double chance of avoiding an eventual resort to Congress. The same process might be observed in electing the Vice-President."

These quotations plainly reveal Madison's dissatisfaction with the method prescribed by the Constitution for an



election by the House of Representatives, his decided preference for the district system, and his conviction that its employment had been commanded by the spirit, though not the letter, of the Constitution.

In a letter written to McDuffie on January 3, 1824, while the McDuffie amendment was before the House, Madison reiterated the views set forth in his letter to Hay; and a few days later, in a note to Jefferson, he said:

"If electoral districts and an eventual decision by joint ballot of both Houses could be established, it would, I think, be a real improvement; and, as the smaller States would approve the one, and the larger the other, a spirit of compromise might adopt both."

The presidential election of 1824 put an end to the practice of caucus nominations, but it did not terminate the efforts for the abolition of the electoral system. Benton, in his *Thirty Years' View*, says that the resolutions presented in the Senate in December, 1823, were referred to a select committee of five, but as no definite action was taken the attempt was resumed in the session of 1825-26. The number of the committee, fixed at five in 1824, was raised to nine at the suggestion of Van Buren. The committee was appointed by Calhoun, then Vice-President, and, says Benton, was carefully selected both geographically, as coming from different sections of the Union, and personally and politically, as being friendly to the object and known to the country. The committee consisted of Benton, as chairman, Macon, Van Buren, Hugh L. White, of Tennessee, Findlay, of Pennsylvania, Dickerson, of New Jersey, Holmes, of Maine, Hayne, of South Carolina, and Colonel Richard M. Johnson, of Kentucky.

The committee of five, early in 1824, reported an

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amendment substantially like the Benton proposition of December, 1823. Van Buren was not at that time in favor of the Benton plan. Division into districts would tend "to reduce greatly the present weight of the large States in the general scale" by "preventing them from bringing their consolidated strength to bear upon the presidential question." The Missouri plan asked no concession from the smaller States. Enlarging upon the great disadvantage the more populous States suffered from the equality of representation in the Senate, he asked

"whether it was reasonable to expect the large States would ever assent to the proposition of the gentleman from Missouri reducing their political weight in the confederacy, without any concession of any kind on the part of the other States. He thought not."

It was his judgment that if the States were to be districted, the ultimate choice of President should be placed elsewhere than in the House, and decided upon more equitable principles. The debate in the Senate became very animated on March 18, 1824, when Rufus King, of New York, who had been a member of the convention of 1787, declared the time inauspicious for a sober and impartial examination of the various amendments, "in view of the excitement throughout the country respecting the next presidential election." King then launched into a bitter arraignment of the caucus system, denominating it a "great central power" at the seat of government, "neither deputed from nor appointed by any established rule among the States, but proceeding from a self-created body unknown to the Constitution," which assumed the right to nominate the President. He criticised members of Congress for devoting more of their time during a presidential year to plans for the election of their candidate than to the legitimate business of Congress. The

course of events during the winter had led near observers "to suspect a connection" between this "formidable central power" and "the Legislatures of Georgia, North Carolina, Virginia, and New York, and, perhaps, of other States." He preferred to adhere to the existing Constitution in the hope that "means might be devised to suppress this power which is now oppressing the Constitution by controlling and superseding its wise and well-considered provisions." The debate, which continued through three days, became alternately a vindication of and attack upon the caucus system, in which the merits or demerits of the various amendments were forgotten. As Eaton, of Tennessee, said, "the Senate has spent two days in debating whether it is proper for members of Congress to go into caucus." Despite the protest of Van Buren, Macon, and others, a motion to postpone indefinitely all consideration of the proposed amendments was carried by a vote of 30 to 13, Macon, Benton, Dickerson, and Van Buren being conspicuous among the negatives.

Benton, from the select committee, on January 19, 1826, made a report which elaborately set forth the grounds upon which the proposed amendment was supported. The proposed amendment dispensed with electors, created electoral districts in which a direct vote of the people was to be taken, and obviated "all excuse for caucuses and conventions to concentrate public opinion, by proposing a second election between the two highest in the event of no one receiving a majority of the whole number of district votes in the first election." When the subject came before the Senate, on May 8, 1826, Benton stated that its consideration had been postponed upon request until the same subject had been discussed in the other branch of the legislature, for it was deemed inadvisable to carry on a dual debate at the same time. Such had been the issue of the discussion in the House

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that it was not deemed wise to take any further step to obtain a definitive vote at the existing session. Benton declared that when the resolution was first introduced in 1823 discussion was opposed as premature, as a presidential election was soon to be held. Upon its reintroduction, the occasion was again said to be inopportune, as it was too soon after the election and, accordingly, might have a bearing on the events of that election, and furthermore be considered personally offensive. It was impossible to find a time which should be free from objection, but Benton solemnly pledged himself to continue the effort until a decisive vote should be reached, and, if it were not reached, to transfer his exertions "to the theatre of the people themselves, and urge the call of a national convention." Van Buren observed that, while the advanced stage of the session furnished sufficient reason for postponement, there were other reasons. The result in the House was well known to the Senate. Nothing could be done at that session in the upper chamber, but he would unite with the chairman to press the matter to a favorable conclusion early in the following session, notwithstanding the decision by the House. Upon no point were the people more thoroughly united than upon the "propriety, not to say indispensable necessity, of taking the election of President from the House of Representatives." In support of this conviction he could appeal to the recent vote in the House. But the small States would never consent to give up their power without an equivalent. The equivalent with which they should be satisfied was "the breaking up of the consolidated strength of the large States by the establishment of the district system." After remarks by other members of the select committee, the resolution, on Benton's motion, was tabled.

The amendment reported by the select committee of nine is so important that it is reproduced in full:

“ That hereafter the President and Vice-President of the United States shall be chosen by the people of the respective States, in the manner following: Each State shall be divided by the Legislature thereof into districts, equal in number to the whole number of Senators and Representatives to which such State may be entitled in the Congress of the United States; the said districts to be composed of contiguous territory, and to contain, as nearly as may be, an equal number of persons entitled to be represented under the Constitution, and to be laid off, for the first time, immediately after the ratification of this amendment, and afterwards at the session of the Legislature next ensuing the apportionment of Representatives by the Congress of the United States; or oftener, if deemed necessary by the Legislature of the State; but no alteration after the first, or after each decennial formation of districts, shall take effect at the next ensuing election after such alteration is made. That, on the first Thursday, and succeeding Friday, in the month of August of the year one thousand eight hundred and twenty-eight, and on the same days in every fourth year thereafter, the citizens of each State, who possess the qualifications requisite for electors of the most numerous branch of the State Legislature, shall meet within their respective districts, and vote for a President and Vice-President of the United States, one of whom, at least, shall not be an inhabitant of the same State with himself; and the person receiving the greatest number of votes for President, and the one receiving the greatest number of votes for Vice-President in each district shall be holden to have received one vote; which fact shall be immediately certified to the governor of the State, to each of the Senators in Congress from such State, and to the president of the Senate. The right of affixing the places in the districts at which the elections shall be held, the manner of holding the same, and of canvassing the votes, and certifying the returns, is reserved, exclusively, to the Legislatures of the States. The Congress of the United States shall be in session on the second Monday of October, in the year one thousand eight hundred and twenty-eight, and on the same day in every fourth year thereafter; and the president of the

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Senate, in the presence of the Senate and House of Representatives, shall open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be President, if such number be equal to a majority of the whole number of votes given; but if no person have such majority, then a second election shall be held, on the first Thursday and succeeding Friday in the month of December, then next ensuing, between the persons having the two highest numbers, for the office of President: which second election shall be conducted, the result certified, and the votes counted, in the same manner as in the first; and the person having the greatest number of votes for President shall be the President. But, if two or more persons shall have received the greatest and an equal number of votes, at the second election, the House of Representatives shall choose one of them for President, as is now prescribed by the Constitution. The person having the greatest number of votes for Vice-President, at the first election, shall be the Vice-President, if such number be equal to a majority of the whole number of votes given, and, if no person have such majority, then a second election shall take place, between the persons having the two highest numbers, on the same day that the second election is held for President, and the person having the highest number of votes for Vice-President shall be the Vice-President. But if two or more persons shall have received the greatest number of votes in the second election, then the Senate shall choose one of them for Vice-President, as is now provided in the Constitution. But, when a second election shall be necessary in the case of Vice-President, and not necessary in the case of President, then the Senate shall choose a Vice-President, from the persons having the two highest numbers in the first election, as is now prescribed in the Constitution."

The prominent features of the plan as described by Benton were: "1, the abolition of electors and the direct vote of the people; 2, a second election between the two highest on each list, when no one has a majority of the whole; 3, uniformity in the mode of election." To

provide for a possible contingency, a tie vote at the second election, which Benton thought "too improbable ever to occur," and to avert the necessity of a third popular election, a resort to the House of Representatives was provided. The plan was unanimously recommended by the whole committee, but it did not receive the requisite support of two-thirds of the Senate. Benton appreciated the difficulty of carrying a project for an amendment through Congress unless it had what he termed "the powerful impulsion of the people" to urge it through the Houses.

"Select bodies are not the places for popular reforms. These reforms are for the benefit of the people, and should begin with the people; and the Constitution itself, sensible of that necessity in this very case, has very wisely made provision for the popular initiative of constitutional amendments."

So optimistic was the great Missourian that he continued his efforts for twenty years.

"There should be no despair on account of the failures already suffered. No great reform is carried suddenly. It requires years of persevering exertion to produce the unanimity of opinion which is necessary to a great popular reformation; but because it is difficult, it is not impossible."

This amendment, had it been ratified, would have left no pretext for caucuses or conventions; it was too radical and was not in consonance with the evolution of party government. It naturally failed to provide for the problems in counting votes which were soon to begin to vex leaders in Congress. Jackson, in his first message to Congress, lent the proposition all his support. "The mode may be so regulated," he argued, "as to preserve to each State its relative weight in the election; and a failure in the first attempt may be provided for, by con-

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fining the second to a choice between the two highest candidates." He also favored limiting the service of the chief magistrate to a single term of either four or six years. The consideration of the proposition was urged upon Congress by the President in all his subsequent annual messages. But years of continuous recommendation were futile of result, for three reasons, said Benton :

" 1. The conservative spirit of many, who are unwilling under any circumstances to touch an existing institution. 2. The enemies of popular elections, who deem it unsafe to lodge the high power of the presidential election directly in the hands of the people. 3. The intriguers, who wish to manage these elections for their own benefit, and have no means of doing it except through the agency of intermediate bodies,"

(the most potent of which he styled "conventions," with all the evils of the caucus system and others peculiar to themselves). These objections are as operative to-day as they were eighty years ago. In December, 1834, Jackson, in his annual message, again recurred to the topic and expressed his conviction that the best interests of the country would be promoted by the adoption of some plan for a dual vote by the people; and he renewed the recommendation in his final message in December, 1836. Jackson's interest in the subject stimulated George R. Gilmer, of Georgia, to move a resolution in the House. Gilmer was made chairman of a special committee, which reported an amendment with the features embodied in the project of the Senate committee of nine, in 1826-27. It combined the direct choice by the people and the second popular election, in a case of a tie, of the Benton amendment, with a provision that, in case of the death of the successful candidate at the second popular election, the Vice-President then in office should be President. In case of a tie at the second popular election, the President was to be chosen by the House and the



Vice-President by the Senate. But this proposition was never acted upon.

Benton urged the reform upon the Senate in December, 1833, in a speech denouncing the general-ticket system as unfriendly to the rights of the people; "it enables the majority to impress the votes of the minority, and that ought to condemn it in a country of equal rights." Tyler, of Virginia, in turn, attacked the district system, arguing that it would efface "all the boundary lines of the States," and succeeded in tabling Benton's resolution. While the great Virginians of 1800 deprecated the general-ticket system, their successors in Congress, Archer and Stevenson, in 1826, and Tyler, in 1833, were its staunch defenders. A similar amendment was offered in the Senate in 1837 by Allen, of Ohio, and was referred to a committee of the ablest men who have ever sat in that body. The members of this committee were Allen, Silas Wright, Calhoun, Buchanan, Webster, Benton, Rives, of Virginia, Crittenden, of Kentucky, and John M. Clayton, of Delaware, but nothing seems ever to have been done. A resolution introduced in the House on December 13, 1836, by McComas, of Virginia, which was referred to a committee, differed from all other resolutions in containing a provision as follows:

" If no person have such majority, or if the person having the majority of the whole number of votes given shall have died before the counting of the votes, then a second election shall be held on the first Monday and succeeding Tuesday and Wednesday in the month of December next ensuing, which shall be confined to the persons having the two highest numbers of votes at the preceding election. But if two or more persons have the highest or an equal number of votes, then to the persons having the highest number of votes; provided, however, if in the first election there were but two persons voted for, and the person receiving the highest number of votes shall have died before the counting of the votes,

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then in the second election the choice shall not be confined to the persons previously voted for; but any person may be voted for who may be otherwise qualified by the Constitution to be President or Vice-President of the United States "

and so on to a third election, to be held in January.

In 1844 Benton offered a proposed amendment in the Senate, which was substantially the production of the Senate committee of nine, with the exception that it dispensed with an election in the House of Representatives in the event of no choice at the second popular election, and substituted a provision that if two or more persons should have received the greatest and an equal number of votes at the second popular election, then the person who should have received the greatest number of votes in the greatest number of States should be President. Benton supported his plan with the same warmth and earnestness he had evinced in 1823 and 1824. The will of the people he declared

" was liable to be frustrated in the election of their chief officers (and that at no less than three different stages of the canvass) by the intervention of small bodies of men between themselves and the object of their choice. First, at the beginning of the process, in the nomination or selection of candidates. A Congress caucus formerly, and a national convention now, govern and control that nomination; and never fail, when they choose, to find pretexts for substituting their own will for that of the people. Then a body of electors, to receive and hold the electoral votes, and who, it cannot be doubted, will be soon expert enough to find reasons for a similar substitution. Then the House of Representatives may come in at the conclusion, to do as they have done heretofore, and set the will of the people at absolute defiance."

The plan would effectually remedy all these evils and rescue the voters from the tyranny of conventions and electors,—a plan that had been urged by eminent states-

men of an earlier epoch and had been "received with great favor by the Senate and the country" at the time it was first reported. He declared that he had never attended a nominating caucus or convention, and never intended to attend one. He had seen the last Congress caucus in 1824, and "never wished to see another, or hear of another; he had seen the national convention of 1844, and never wished to see another." And while he should support the nominations of the last convention, he added with an optimism which intervening events have made less intelligible that he "hoped to see such conventions rendered unnecessary before the recurrence of another presidential election."

When the Benton amendment was first proposed, the caucus system of nominations was nearing extinction, and the convention system was an embryo. But for this fact it would seem extraordinary that such a master of the convention method as Van Buren should advocate a plan of election that would render nominating bodies unnecessary. In the evolution of American politics, the convention soon came to be recognized as an organ of the highest consequence for ascertaining the will of the people, and however imperfect the instrument, there is as yet no evidence of a strong popular desire to abandon it. Inasmuch as constitutional development should proceed on parallel lines with institutional development, it would be a vital mistake to incorporate in the organic law either a positive or negative provision that would hinder the free play of natural political forces. Benton's plan for a dual popular election has been revived but once since his death. During the debates in Congress upon the Civil War amendments, Sumner offered an amendment, of which he said:

"Such an amendment has not appeared in this discussion, though it is not unknown in this chamber, for distinguished

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Senators who once occupied these seats have more than once advocated it — I mean an amendment providing for the election of President directly by the people, without the intervention of electoral colleges. Such an amendment would give every individual voter, wherever he might be, a positive weight in the election. It would give minorities in distant States an opportunity of being heard in determining who shall be chief magistrate."

Although the proposition then before the Senate was debated, it never reached a vote, and Sumner's suggestion fell with it. Sumner subsequently introduced an amendment to supersede the electoral system, the representative features of which were as follows:

The regular presidential election is to be held on the first Monday of April, and the result in each State and Territory is to be certified and forwarded to the seat of government as Congress by law may direct. On the Tuesday next succeeding the third Monday in May the returns shall be opened in joint convention of the two Houses of Congress, and the person having a majority of the votes cast shall be President. If no person have such majority, or the person having it decline the office or die before the counting of the vote, then the president of the Senate shall so proclaim, and the proceedings shall be officially published, and another election shall be held on the following second Tuesday of October, at which the three persons having the highest number of votes at the preceding April election shall be voted for by the people. These votes shall be counted in Congress on the third Tuesday in December following, and the result proclaimed. In case of a vacancy occurring in the office of the President, the members of Congress in joint convention shall proceed to elect by *viva voce* vote a President to fill such vacancy, each member having one vote, and a majority being requisite for election. The

President shall not be eligible for re-election; and the office of Vice-President shall be abolished.<sup>1</sup>

On January 21, 1875, Morton, addressing the Senate upon the amendment which he had offered in that body in the spring of 1874, said that its purpose was to bring the election home to the people, as well as to avoid the dangers of the existing method. No more important question could be considered by the Senate:

"In my opinion great dangers impend, owing to the imperfection of the present system of electing. . . . Trouble has been averted merely by a series of happy accidents, but we cannot hope that these happy accidents will continue to occur. . . . The present plan originated in a profound distrust of the people. It placed the appointment of electors absolutely under the control of State Legislatures. The States could not by their constitutions control or in any manner change the appointment of electors. The power of a Legislature to appoint electors is not conferred by the State constitution, but is conferred by the Constitution of the United States, so that it is not in the power of a State constitution to take from the Legislature the power to appoint electors in any way that that Legislature may see proper. The Legislature may repeal any day the law by which electors are elected by the people, and may direct them to be elected by joint ballot of the two houses; or may authorize the governor of the State or its Supreme Court to appoint them."

#### One difficulty of the electoral system was that Congress

<sup>1</sup> For a fuller account of this amendment, see an article in 117 *North Amer. Review* (October, 1873), by R. H. Dana, Jr. Mr. Dana seems to favor some such plan as is advocated in this book, "of dividing the presidential vote of a State according to the popular division manifested at the polls," which "might be accomplished through the principle of minority representation. The footings of the votes of the two parties on election day would show what proportion of the presidential votes of the State each party would be entitled to."

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has no power to determine whether an election has been properly held or not:¹

“No contested election of electors can be determined by the Congress of the United States, because the Constitution has placed that election absolutely and entirely with the States. If they make no provision for cases of contested election, Congress cannot do it. All its power is to fix the time when the electors shall be chosen by the States and to determine the day when they shall come together as electors to cast their votes, which shall be the same day in all the States. The States have failed to make provision for contesting the election of electors. Though the election may be distinguished by fraud, notorious fraud, by violence, by tumult, yet there is no method for contesting it; no State has passed a law for that purpose; . . . there is no time for a contest, even if the States were disposed to enact such a law. Congress, in 1792, in effect prohibited any contest either by the State or by Congress. Electors cannot be called together again after they have voted. They vote by ballot under the Constitution; the vote is sealed, and sent to the president of the Senate, and is not opened until it is counted in the presence of the two Houses. . . . It seems never to have occurred to the members of the convention that there could be two sets of electors or that there would be fraud or corruption or any reason why votes of electors should be set aside.”

He argued also that the theory of the electoral college had utterly failed:

“It has turned out in practice that the electors are pledged in advance to vote for a particular candidate, . . . a pledge that has never been violated, and the violation of which would bring upon the offending party all the indignation that society could invent. . . . Therefore the theory is a total failure. . . . The reasons for the electoral college have

¹ Morton consistently held to these views in his opinions as a member of the Electoral Commission of 1877.

gone. Why not let the people vote themselves for the presidential candidates, instead of voting for electors who are pledged to do the same thing?"

In instancing some of the dangers and difficulties of the system, he said that, by law, when electors have died since their election or failed to attend, the others may fill their vacancies:

"In the case of Texas at the last election (1872), when the electors met to vote, four were absent, just one-half the whole number. The other four supplied the vacancies by election. Suppose there should be five in favor of one candidate, and five in favor of another, and one elector dies? Then one five will have the majority over the other, and they can fill the vacancy and they can thus secure a majority in the electoral college."

While Morton argued for the district system, he was obliged to concede its limitations:

"By the election by districts you do not bring the vote absolutely home to the people, as you would by a vote as one community, but you come as near to it as possible. . . . These districts may be gerrymandered, as they are for Congress. That has been done. It is an evil. You cannot correct it altogether."

Under the general-ticket system "no man can vote unless he has a party in the State large enough to hold a convention and put an electoral ticket in the field." Suppose, he continued, the election of 1872 had depended upon the vote of Louisiana or Arkansas or Texas?

"Would we not in all probability have been involved in revolution? . . . It was a matter of congratulation to both Democrats and Republicans that Grant's majority was so large as to make the vote of Louisiana or Arkansas and of Texas unimportant. Dispense with the requirement of a majority and adopt the plurality system, and avoid an election by

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the House altogether. The plurality rule is adopted by all the States except three in the election of State officers, . . . and by all in regard to the election of members of Congress. . . . It has worked well in the States and no State now proposes to go back from the plurality to the majority system."

To an election of the President by the House of Representatives Morton had long been an opponent, nor did he omit opportunity to show how unjust such a form of election was. Under the existing apportionment, each State having one vote, forty-five members out of a total of two hundred and ninety-two in the House could elect the chief executive. He alluded to the election of 1825 and asked whether the Government could stand the strain of another election in the House. Referring to that part of the amendment providing a tribunal for the decision of contested elections, Morton said that it had been "a subject of grave consideration in the committee." Some were in favor of constituting the Supreme Court the tribunal, others wished to clothe the circuit courts, or the district courts, of the United States with adequate powers; others thought that a special tribunal should be created by Congress. "It was then thought better to place the whole matter in the decision of Congress. . . . If we should put any special tribunal into the Constitution it might not work well and it might be difficult to change it." Thurman insisted that there should be provision for a tribunal in the fundamental law, so that every party should be compelled to obey its behests.

In conclusion, Morton said:

"For more than seventy years attempts have been made at different times to change the Constitution so as to avoid some of these dangers. Amendments have passed the Senate and the House four times by a two-thirds majority to avoid some



of these evils, and yet finally failed. . . . The remedy proposed is not new, it is almost as old as the Constitution. Seventy years ago some of the ablest men in the Senate of the United States foresaw these dangers."

After discussion of the proposed amendment by Thurman, Edmunds, Conkling, Anthony, and others, immediate interest in its passage seems to have subsided, perhaps for the reason that Morton succeeded in pressing his bill to regulate the electoral count to a favorable vote, which was reached in the Senate on February 25, 1875.

Morton reintroduced his amendment in the Senate on December 4, 1876, but, in view of the excitement of the time and the urgency of securing some temporary method of counting the electoral vote upon which the discordant Houses might agree, it failed to elicit much attention; and the early introduction of the Electoral Commission bill rendered debate upon it impracticable. As soon as the presidential succession dispute was decided, he again undertook the advocacy of his remedy. In the *North American Review* in May, 1877, he declared: "Experience, as well as reason, now suggests that the rubbish of the electoral college be brushed away entirely," and in a later article in the same *Review*,<sup>1</sup> published in July, 1877, he repeated the arguments from his various speeches in the Senate. His death in the prime of life, in November, 1877, from a disease the inroads of which his iron will had resisted for years, deprived the cause of presidential electoral reform of its most assiduous and convincing exponent.

The full text of the Morton amendment is as follows:

"Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled (two thirds of each House concurring therein), That the following

<sup>1</sup> 125 *N. A. R.*, 68.

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article is hereby proposed as an amendment to the Constitution of the United States, and when ratified by the Legislatures of three fourths of the several States, shall be valid, to all intents and purposes, as a part of the Constitution, to wit:

### "ARTICLE

" I. The President and Vice-President shall be elected by the direct vote of the people in the manner following: Each State shall be divided into districts, equal in number to the number of Representatives to which the State may be entitled in the Congress, to be composed of contiguous territory, and to be as nearly equal in population as may be; and the person having the highest number of votes in each district for President shall receive the vote of that district, which shall count one presidential vote.

" II. The person having the highest number of votes for President in a State shall receive two presidential votes from the State at large.

" III. The person having the highest number of presidential votes in the United States shall be President.

" IV. If two persons have the same number of votes in any State, it being the highest number, they shall receive each one presidential vote from the State at large; and if more than two persons shall have each the same number of votes in any State, it being the highest number, no presidential vote shall be counted from the State at large. If more persons than one shall have the same number of votes, it being the highest number in any district, no presidential vote shall be counted from that district.

" V. The foregoing provisions shall apply to the election of Vice-President.

" VI. The Congress shall have power to provide for holding and conducting the elections of President and Vice-President, and to establish tribunals for the decision of such elections as may be contested.

" VII. The States may be divided into districts by the Legislatures thereof, but the Congress may at any time by law make or alter the same."

This amendment is defective in several respects. The word "people," which appears only in the preamble to the Constitution, is inexact. The vote is not by the people, but by citizens upon whom the privilege of suffrage is conferred. It would have been wiser to define the qualifications of citizens entitled to vote directly for the President and Vice-President. Waiving for the present the question whether the district system should be adopted, I think the provision as to districts inadequate. The Benton amendment is, in this particular, better, in limiting the possibilities of "gerrymandering." This differs again from Madison's plan to forbid alteration of the districts within a definite period previous to the election of President. The partial disfranchisement of a great commonwealth might happen under the Morton scheme should more than two candidates have the highest and an equal number of the presidential votes of a State, as the State has only two presidential votes at large and cannot divide these two among more than two candidates. This puts a penalty upon intelligent suffrage,—for a close State is likely to be an intelligent one,—and unjustly limits its voting ratio. Nor does the amendment contain any clause providing what shall happen in the event of the death or disability of the President-elect. The sixth clause is uncertainly phrased: "The Congress shall have the power to provide for holding and conducting elections, and to establish tribunals for the decision of such elections as may be contested." The power to provide for holding and conducting elections may be broadly or narrowly construed, but it is questionable whether this power includes the ascertainment of results, and in this respect the present Constitution is woefully deficient. Nor does such ascertainment devolve upon the tribunals which Congress is empowered to create, for these are merely for the decision of contested elections. In some particulars the Benton amend-

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ment is more specific, for Benton required the result of the vote in the State to be certified to the State governor, its two Senators, and the president of the Senate. The conduct of elections, including the canvass and the certification of the votes, should either be explicitly lodged in the State or in Congress. Benton proposed to reserve it to the State. His amendment is superior in prescribing the qualifications of the persons exercising the right to vote for President. The chief criticism upon both proposals is that they fail to provide definite and precise means for the ascertainment of the State canvass and for a final determination of all questions arising upon the electoral count.

An amendment embodying some of the principles of the Hare plan for minority representation was formulated by Levi S. Maish, of Pennsylvania, and offered by him in the House, and by Senator Charles R. Buckalew, of that State, in the Senate, in February, 1877. This proposition was elaborately discussed by Buckalew in an article in the *North American Review*.<sup>1</sup> The main features of the Maish plan are as follows:

“The citizens of each State who shall be qualified to vote for Representatives in Congress shall cast their votes for candidates for President and Vice-President by ballot; and proper returns of the votes so cast shall be made, under seal, within ten days, to the secretary of State or other officer lawfully performing the duties of such secretary in the government of the State, by whom the said returns shall be publicly opened in the presence of the chief executive magistrate of the State, and of the chief justice or judge of the highest court thereof; and the said secretary, chief magistrate, and judge shall assign to each candidate voted for, by a sufficient number of citizens, a proportionate part of the electoral votes to which the State shall be entitled, in manner following, that is to say: they shall divide the whole number of votes returned

<sup>1</sup> 124 *N. A. R.*, 163.

by the whole number of the State's electoral vote, and the resulting quotient shall be the electoral ratio for the State, and shall assign to candidates voted for one electoral vote for each ratio of popular votes received by them respectively, and, if necessary, additional electoral votes for successive largest fractions of a ratio shall be assigned to candidates voted for, until the whole number of the electoral votes of the State shall be distributed; and the said officers shall thereupon make up and certify at least three general returns, comprising the popular vote by counties, parishes, or other principal divisions of the State, and their apportionment of electoral votes as aforesaid, and shall transmit two thereof, under seal, to the seat of government of the United States, one directed to the president of the Senate and one to the Speaker of the House of Representatives, and a third unsealed return shall be forthwith filed by the said secretary in his office, be recorded therein, and be at all times open to inspection."

This amendment, Buckalew explained, would have these important results:

" 1. It will very greatly reduce, in fact, almost extinguish, the chance of a disputed election, by causing the electoral vote of the State to be very nearly a reflex of the popular vote, by confining the effect of fraud and other sinister influences within narrow limits, and by withdrawing the compact, undivided power of any one State from the contest. Giving a just allotment of electoral votes to candidates, not greatly too many or too few, it conforms to the popular sense of justice and tends to allay passion and prevent controversy. It excludes the temptation to falsify or manipulate election returns, by which the whole vote of the state may be wielded in the interest of a party. Under it there would be no rival electoral colleges, or double returns of electoral votes, and pivotal States, inviting to profuse money expenditure, to fraud and to false returns, would no longer be known as a conspicuous feature of presidential contests.

" 2. It will render almost impossible the election of a mi-

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nority candidate in a contest between two, and will in many cases prevent a plurality candidate from receiving an unjust electoral vote, and often from being improperly returned to the House of Representatives as one of the three persons from whom a choice is to be made, in cases where the power of choice shall devolve upon that house. It will secure justice by insuring a fair representation of the people, and applying the majority rule to the electoral instead of the popular vote; in other words, all the people will be represented by electoral votes, and the majority principle will be properly applied when the general returns of those electoral votes shall be subjected to computation. Popular disfranchisement within a State will be swept away, while the supporters of no candidate will control more than their due share of electoral power.

“3. It will very greatly discourage and prevent unfairness and fraud in elections, by excluding the motives which produce them. In this respect its superiority to other plans of amendment is conspicuous and unquestionable. Assuming a ratio of thirty thousand for an electoral vote, a fraudulent vote of ten thousand would mean one third of an electoral vote,—in other words, would mean nothing as to results,—instead of meaning, as it now does in many cases, the balance of power in a State, and the control of its *whole* electoral vote! In a State like New York or Pennsylvania, a fraudulent vote of even thirty or forty thousand would affect but one electoral vote out of thirty or forty cast by the State, instead of transferring all those thirty or forty votes from one candidate to another. Speaking within bounds, the effect of any common fraud in presidential elections would become inappreciable, and the motive for committing such fraud would be wholly removed. Could there be a more complete device for purifying and improving elections than this, or one more imperatively demanded by the necessities of the times? District voting for electors would not extirpate this evil of corrupt elections, for the balance of power vote in each district would be the object of money expenditure and evil influence as we already have them in congressional districts. Ten thousand foul votes in a State might control half a dozen or more

districts, while they would be entirely lost when counted in the aggregate or total vote of the State."

The disputed count of 1877 emphasized so sharply the defects in the present system that a number of amendments were proposed in the special session of Congress which commenced on October 15, 1877, and in the next succeeding regular session. Nearly all these amendments aimed to dispense with presidential electors, and two of them, following the Maish plan, proposed to apportion the presidential votes of each State among the respective candidates according to the ratio of the popular vote for each. Representative Springer, of Illinois, one of the ablest advocates in the House of the Electoral Commission bill of 1877 and a staunch believer in the doctrine that the Houses in joint meeting were clothed with the power to count the electoral votes, offered an amendment in the House on October 29, 1877, which extended the presidential term to six years, and deprived the President of immediate re-eligibility. This plan, if carried into effect, would have abridged the influence of the small States, for it provided that States having but one Representative in the House should have but one presidential vote, and that States entitled to only two such Representatives should have three votes. The governor, the secretary of State, and the chief justice of the highest appellate court in each State were to be the State canvassers, but their powers were to be ministerial only. The Senate and the House of Representatives were to meet in joint convention in the hall of the House on the third Monday of January succeeding each presidential election; the president of the Senate was to preside, unless he was the recipient of a majority of the presidential votes of any State, in which event the Speaker of the House was to assume that office, and if he, for like reason, was disqualified, the "joint convention" was to choose a presiding officer; and the

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"joint convention" was made "the judge of the election, returns, and qualifications of the persons who shall be President and Vice-President." Obviously the small States would never make the sacrifice of prestige this amendment would require. But the chief defect in the Springer proposition is that it overturns the theory of the Constitution, by vesting the "joint convention" with powers similar to those which the two Houses now enjoy as to the election of their own members. That the "joint meeting" possessed such authority was cogently urged in the Louisiana case before the Electoral Commission, but Mr. Justice Bradley trenchantly exposed the utter weakness of the claim.

Riddle, of Tennessee, proposed an amendment having some of the features of the amendments offered in 1823. There was to be a direct election by the people and a majority was required for a choice. If a majority were not obtained, a second election was to be held within two months after the first election, when the choice was to be narrowed to the two highest names upon the list. If no choice was then effected owing to a tie between the rival candidates at the second election, the two Houses of Congress in joint convention, each member having one vote, were to elect.

An amendment of interest was reported in May, 1878, by Representative Southard, of Ohio, from a committee of the House on the state of the law upon the subject of the electoral count. Two reports were presented by this committee to the House. The majority report contains a draft of a proposed amendment embodying the principle of the Maish plan. The report declares that not only have the reasons failed which were originally urged in favor of the electoral system, but that

"difficulties have arisen, unforeseen and unprovided for, which have put us in great peril more than once. . . . The



Government has no unquestioned remedy for a failure to appoint electors, nor for their failure to act, nor for fraud in the election, and there is no mode for contesting elections; if the electors are chosen on a wrong day, if they vote on the wrong day, if their certificate is defective, if their vote be cast before the State is in the Union, if there are conflicting certificates from the same State, if the persons voted for were not citizens, if the electors were officers of the Government, if a certificate contains too many electoral votes, for none of these cases has any competent provision been made by law. The congressional records are full of angry debate on all these questions. The difficulty began in 1805 upon the vote of Massachusetts; it occurred again in 1817 upon the vote of Indiana, in 1821 upon the vote of Missouri, in 1829 upon the votes of Virginia and several other States, in 1837 upon the vote of Michigan, in 1857 upon the vote of Wisconsin, in 1865 upon the vote of Nevada, in 1869 upon the vote of Georgia, in 1873 upon the votes of Georgia, Mississippi, Texas, Arkansas, and Louisiana, in 1877 upon the votes of Louisiana, Florida, South Carolina, and Oregon."<sup>1</sup>

The report starts with the theory of the independence and equality in relation to their own exclusive affairs of all the States in the Union. While it accepts the compromise between small and large States upon which the Government was organized, it refutes the notion that a vote by a State *en bloc* is essential to the maintenance of statehood. It truthfully says:

"It was not intended by the framers of the Constitution, nor does that instrument require—no matter whether the electors be appointed by the Legislature, people, or otherwise—that the State, as an entity, should cast the electoral vote *in solido* for a particular candidate. The electors, when appointed, were to be perfectly free each to exercise his judg-

<sup>1</sup> The act of February 3, 1887, which was passed nine years after the date of this report, prescribes, as I have heretofore shown, no remedy for any of these difficulties.

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ment and discretion in casting his vote. Under such circumstances, it would be unreasonable to infer that the electors would be unanimous in their choice. The reverse was intended and expected, and in this freedom of action the merit of the system was supposed to rest."

The adoption of the general-ticket system, like the idea of the balance of power in Europe, had its origin in self-preservation, for its use by one or more of the larger States was a coercive influence upon all the others, unless they wished to sacrifice their representative weight. No one deplored its spread more than Madison, and while Madison, upon the theory of "retributive justice," reluctantly urged the Legislature of Virginia in 1800 to adopt the general-ticket system, John Nicholas, in the House of Representatives in March of the same year, offered his proposed amendment making the district system compulsory. As the report says, "the result of the election is under the control of the large cities, such as New York and Philadelphia and Chicago, the very places where fraud is most easily perpetrated, where the temptations to it most abound."

The minority report is filled with vague alarm at the so-called centralizing tendency of the majority view; but the alarm is groundless, for it is as nearly susceptible of demonstration as any political fact can be, that the plan of apportionment of the electoral votes of a State among the voters of that State as first proposed by Maish, advocated by Buckalew, and favored by the majority report of the House committee, most completely guarantees the absolute independence and integrity of the State. The fallacious notion of the minority, a fallacy repeatedly urged, and as often exposed, in Congress, is that a majority of the voters of a commonwealth represent the State. The minority say:

"The right to speak by a majority, when its fundamental

laws permit, is a right inherent in every republic. This plan takes away from these republics, the States, this right *to speak by their majorities*, and confers upon the United States the right to say by a majority of the whole who shall be President and Vice-President."

If the right to speak by a majority is inherent in republican government, that right has been steadily infringed since the Union was formed, both in national and State elections, for there have been minority Presidents, minority governors, minority Senators and Representatives. The contention of the minority report would render "majority government" a despotism. It as effectively disfranchises the minority voter as if he had no ballot, thus politically "keeps the word of promise to the ear, but breaks it to the hope." It utterly misapprehends the scope and intent of the proposed amendment in its assumption that the amendment "confers upon the United States the right to say by a majority of the whole who shall be President and Vice-President." As will hereafter be argued, the apportionment system would give a higher significance to the State and be its most enduring bulwark against encroachment by central authority.

The majority report wisely decided that to the district plan, however distinct an advance it was over the general-ticket plan, there are insuperable objections:

"First, the districts are not now, and could not well be made, permanent geographical divisions, like the States, but would be subject to constant changes by the worst species of gerrymandering. Secondly, there would always be a number of doubtful districts to be contended for by partisan strife. These evils—and they are evils of greatest magnitude—will necessarily be eliminated by the plan proposed. The advantages of the plan are many. It would enable every voter to vote for the man of his choice with an absolute certainty that

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he and those who voted with him would receive their proper proportion of the electoral vote."

The committee further pointed out that under its plan "any fraud capable of being accomplished would affect ordinarily only the smallest fraction of a vote; it would not be worth while to attempt a fraud for such insignificant results." In proof of this the committee says:

"The ratio of the popular vote to an electoral vote at the last presidential election [1876] ranged in the different States from six thousand up to twenty-nine thousand. To secure a single additional electoral vote, a party would be compelled to increase its popular vote to the extent of such ratio in any State; a less increase would give a proportionate fraction of an electoral vote. So great a change of popular vote being required to effect so slight a result in the electoral vote, it needs no argument to demonstrate that the temptation to fraud is almost wholly taken away, and its discovery made certain, if attempted."

The proposed amendment of the committee is as follows:

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two thirds of each House concurring therein), That the following be proposed as an amendment to the Constitution of the United States; which, when ratified by three fourths of the Legislatures of the several States, shall be valid, to all intents and purposes, as part of the said Constitution, to wit:*

### "ARTICLE XVI.

"The President and Vice-President of the United States shall be chosen by the people of the several States; the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature; they shall vote by ballot for President and Vice-President on the

day provided by law, which day shall be fixed by Congress, and be the same throughout the United States.

“ Each State shall be entitled to a number of electoral votes equal to the number of Senators and Representatives to which the State may be entitled in the Congress.

“ The electoral votes, and fraction thereof, of each person voted for as President in any State, shall be ascertained by multiplying his entire popular vote therein by the whole number of the electoral votes of the State, and dividing the product by the aggregate popular vote of the State for all persons voted for as President; and the quotient shall be the number of electoral votes and fraction thereof to which such person shall be entitled, using for such fraction three decimals and no more.

“ The foregoing provisions shall apply to the election of Vice-President; but no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

“ Within ten days after any presidential election, the returning officers of elections in each State, in accordance with the laws thereof, shall make proper returns in duplicate of the votes cast for President and Vice-President, and shall transmit the same, under seal, to the secretary of State, or other officer lawfully performing the duties of such secretary, one of them by mail and the other by special messenger, and the said returns shall be publicly opened by said secretary or other officer in the presence of the chief executive magistrate of the State and the State auditor or comptroller; but if either of said officers fail to act, the attorney-general of the State shall act in his stead; and said officers by and before whom said returns are opened shall ascertain the popular vote and forthwith make apportionment of the electoral vote as hereinbefore provided; and shall thereupon make three distinct lists of all persons voted for as President and Vice-President, comprising the popular vote by counties, parishes, or other principal divisions of the State, and their apportionment aforesaid, which lists they shall sign and certify, and shall transmit two of them, sealed, to the seat of government of the United States, one

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directed to the president of the Senate, the other to the Speaker of the House of Representatives; the third list shall be filed and recorded in the office of the said secretary of State. Said apportionment shall be made on a day fixed by Congress, and be the same throughout the United States.

“If there shall be a contest in any State as to the election of President or Vice-President, the same may be passed upon by its highest judicial tribunal, in accordance with its laws; the decision thereof shall be by it certified and transmitted, sealed, to the seat of government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of both Houses of Congress, assembled for that purpose in the hall of the House of Representatives, open all the certificates; the electoral votes shall then be counted by the two Houses, as certified, unless rejected by both Houses; but if there be a certificate of decision by the highest judicial tribunal of any State upon a contested election therein, the electoral votes of such State shall be counted in accordance with such decision, unless the same be overruled by both Houses; but if there be no such certificate of decision, the contested votes from any State shall not be counted unless both Houses concur therein. If there be more than one certificate of electoral votes from any State, and no such judicial decision as aforesaid, or if there be more than one such decision from any State, in either case that certificate of electoral votes which shall be held by both Houses to be made by the rightful authority, and that judicial decision which shall be held in like manner to be made by the rightful tribunal, shall be conclusive, and the votes be counted accordingly, unless rejected by both Houses.

“The person having the highest number of electoral votes for President shall be the President; but if two or more persons have an equal and the highest number of such votes, then from such persons the House of Representatives shall choose immediately the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the States,

and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the 4th day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

"The person having the highest number of electoral votes as Vice-President shall be Vice-President; but if two or more persons have an equal and the highest number of such votes, then from such persons the Senate shall choose the Vice-President. A quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice."

The amendment proposed by the Southard committee, although admirable in principle, is disfigured by two extremely undesirable features. It maintains, with slight changes, the substitute election which the present Constitution requires to be held in the House in case of the failure of the electors to agree upon a President, and in the Senate in case of their failure to agree upon a Vice-President. By giving Congress the power to count, the amendment would imbed in the Constitution a doctrine at war with the fundamental notion of distinct governmental departments. The disfranchisement of a State by Congress would become possible if this amendment were to be made part of the organic law, for the difficulty of finding an "ultimate arbiter" between the two Houses inheres in every form of congressional count, whether the count be in accordance with the Morton bill, the act of 1887, or this proposed amendment. All idea of congressional control over the count should be discarded. Southard's plan, on the contrary, would exalt this vicious notion into a constitutional principle.

In a recent article,<sup>1</sup> Mr. John G. Carlisle has argued for an amendment containing the substantive features of

<sup>1</sup> "The Remedy," 24 *Forum*, 657.

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the plans proposed by Maish and Southard. After dwelling upon the dangers of the present electoral system, Mr. Carlisle, in urging its abolition, says that the people, that is, the electors having the qualifications requisite for electors of the most numerous branch of the State Legislature, should vote direct for President and Vice-President. Each State should be given a number of votes, electoral or presidential, equal to the number of its Senators and Representatives in Congress, and in ascertaining the result of the election each person voted for should be entitled to have counted in his favor a number of the presidential or electoral votes of each State corresponding to the proportion of the popular vote received by him in each State.

“The people of each State would continue to vote as they now vote, independently of the people of all the other States, and the effect of their votes upon the result of the election would not depend in the least degree upon the action of the people elsewhere. Voters in the several States would not become voters of the United States, but would remain voters of their respective States.”

Under this plan, he argues, it will be just as important to secure a large vote in one State as in another, but “the demoralizing contests for the control of doubtful or ‘pivotal’ States will not occur.”

No plan has ever been suggested which would so certainly secure minority expression or preclude the possibility of fraud in a presidential election. That it can be so employed as to insure a true and correct count, without conferring canvassing power upon Congress, it will be my aim to show.



## CHAPTER XIII

### A SUGGESTED REMEDY

**T**HE theory of the electoral franchise, as exercised in the United States, is that every voter is a voting unit, of equal force with every other voter. Equality consists not alone in the privilege of enjoying the elective franchise, but in the efficiency of the vote. The voting power of the several units being equal, the only difference lies in aggregates. If the total of the units for one ticket exceed the total for another, the vote for the defeated candidate is ineffective in respect of the immediate end sought. This, however, is but another phase of the law that the stronger force or combination of forces is controlling. Subject to the possibility that in the immediate election,—not in its prospective potency,—the ballot may prove to be inefficacious, every voting unit should be the equivalent of every other and play the same part as its fellows in the creation of an ultimate aggregate. Whatever force there may be in the idea that voting power should be so correlated with education or intelligence as to give the superior intelligence more influence in the exercise of the ballot, that idea has not yet pervaded the American mind, and is at present impractical; for if political philosophy inculcate any lesson, it is that electoral methods are not to be reasoned out in the closet, but are to be evolved from political experience. Cumulative voting, except in so far as the system hereafter to be explained helps to advance it, is equally

out of the question. ( In every gubernatorial or State canvass, where, as is common throughout the country, each citizen deposits his ballot directly for the candidate for the particular office, each vote tends directly and equally towards a particular end,—the creation of a successful aggregate—and sustains no loss of energy by the interposition of some intermediate office or college. In every voting area smaller than the State, the same principle holds good; the individual vote is no less effective, and results are determined according as one aggregate exceeds another. The only instance in the use of the ballot in the United States in which the vote is shorn of its full significance, as a vote, from the moment of its deposit, or, in other words, becomes subject to some influence that may render it absolutely futile and lead to its elimination from the final count, arises under the presidential electoral system. The voting area under the general-ticket system is the State; if the State were parcelled into districts, the voting area would be a district and that area be expanded to embrace the entire country, supposing all State lines effaced. Whenever a presidential election is held, the real aim is, and has been ever since the initiation of the Government, not the election of electors, but the election of the President; and in every State, at every presidential election, owing to the intervention of the electoral college, the voter for electors unsuccessful in that State has never yet deposited a ballot that had the slightest influence in the ultimate aggregate, or count. This result is not commonly appreciated; certainly not by those who affirm that the electoral system, even if obsolete and archaic, is unimportant. Were all electoral mechanism discarded, yet the general-ticket system maintained, the same reduction in the efficiency of each voting unit would continue, and even if the district system were adopted, impairment of the voting power of all voters for an unsuccessful candidate would

result, although in diminished ratio. (The voting unit would rise to its maximum of efficiency if each voter should contribute directly to the electoral result in a State in the ratio which his vote bears to the total number of voting units in that State.)

The general-ticket system stands condemned for many reasons, already given, and the artificial district division is open to the criticism that it would give the ballot of every citizen who votes for a defeated candidate less weight, in itself, than the corresponding ballot of a citizen who votes for the successful one. The introduction of any arbitrary thing between the vote and the result deprives the vote of its force, whether the arbitrary obstruction be an elector or an artificial area, such as a district. A State is not an artificial area, but a living entity, under our system of government, and the relative electoral weight of the several States must be preserved unless the system of the Constitution is to be radically altered. That a State with a population only a fraction of the population of an ordinary congressional district should wield equal or greater power in the election of a President may be unjust in theory, but the compromise was a necessary concession to the smaller States; and unless the States are to form a different sort of union, this electoral inequality will continue. The statistics of presidential elections reveal the fact that this inequality tends towards a minimum, because the vote of one small State for a Republican candidate, for example, is frequently neutralized by that of another little commonwealth for the Democratic candidate. But, as it has to be postulated that State lines are to remain, and that each State is to retain that fraction of its influence in the choice of a President to which its representation in the Senate and in the House entitles it, the only method whereby all the voting units within that State can be placed upon a par of efficiency is by the allotment to every candidate of that proportion

of the presidential vote of the State to which the ratio of the vote for him to the entire vote of the State for all candidates entitles him. Upon this plan and upon this plan only is each voter within the State placed in that situation of equality with every other voter to which the privilege of the suffrage gives him a right. It is true that a voter for a candidate who gains no electoral vote in the State suffers a loss of voting equality, but in a presidential election this is not a fault of consequence, because the tendency has always been to the existence of two formidable political organizations, and if a party cannot muster a sufficient number of voting units in a State to enable it to control at least one electoral or presidential unit, the impairment to the individual vote is not serious. If three or four parties exist, each having considerable or comparatively equal strength, this system will insure to each of them its full electoral significance.

The change has other advantages than its manifest justice to each individual voter. While the district system would be an improvement upon the general-ticket system, in lessening the temptation to fraud and securing a partial representation of minorities and in bringing the executive and the Lower House of Congress into harmony, its liability to the "gerrymander" would greatly impair its usefulness. As a matter of fact no plan has yet been devised that can prevent the reapportionment of districts to suit the needs of partisanship or eradicate the instinct of the politician to use all means not forbidden by statute to secure an election triumph. The greatest of statesmen have not been exempt from the temptation to achieve party success by illicit methods.

Although the district system does not present such inducement to fraud as the general-ticket system, fraud is still possible. Nor does the district system give adequate opportunity for the expression of minority sentiment. It may easily happen that the vote of a few

districts in a State or in different States would be decisive of an election, for certain districts may be corrupted and those districts decide the election. The politician displays a certain narrow form of acumen, and political leaders would be swift to locate and control doubtful districts. Returns could be held back from such districts until results elsewhere were known, and such returns then be manipulated to suit the exigencies of party. Nothing of this kind is possible under the system here advocated; this system gives every voter opportunity not only to vote, but to participate in the actual result of the election.

The vital difficulty under the present system is with the electoral count. (The required improvement is twofold: first, the abolition of the electoral office, and, secondly, the adoption of a system which reduces the ultimate count at the seat of government to a simple mathematical computation) in other words, to what the fathers of the Constitution intended the electoral count should be.

Under the general-ticket system, even without electors, returns substantially similar to those now made by the electoral colleges would be transmitted from the States to the Government. Under the district system there would be similar returns, every separate set of which would be subjected to scrutiny. While returns must be made to Washington under any system, the final count should never be anything more than an enumeration of electoral or presidential votes, the only possibility of difficulty arising where there are two conflicting State governments, a contingency that has to be faced.

The canvass in every State would take place as it does at present in electing a governor, and experience shows that there has rarely if ever been a controversy in any commonwealth, except during the reconstruction era,

over the election of any State official. The canvass should be conducted under the auspices of the ultimate State canvassing board precisely as in the election of a governor or other State official. When the total vote for President or Vice-President shall have been counted and canvassed by the requisite State authorities, it will be the duty of those authorities to allot to each candidate his quota of the presidential votes, this to be ascertained by apportioning to him presidential votes in the ratio between the total popular vote for him and the aggregate popular vote for all candidates. This plan would have the effect of stimulating party activity in salutary directions. Unable longer to rely upon tricks or subterfuges, bribery of voters, falsification of votes or certificates, unable to count upon the strict party loyalty of certain sections, or the apathy of others, or to measure independence or hostile sentiment in any, parties would be forced to the consideration of essentials. Candidates of higher character would be sought, and campaigns be conducted for specific principles. Intelligence and independence would secure more effective expression, and there would thus be achieved one great aim of those who believe in a cumulative educated vote,—that is, the bringing of higher voting qualities into a position of commanding influence in a campaign. The ordinary party voter is in a condition of stable equilibrium, and his vote can be predetermined. It is the independent voter who decides elections, and under the proposed system this kind of citizen fulfils his function best. The educative influence upon the whole mass of citizenship of such a method of voting for the President can hardly be exaggerated.

All impediments placed between the voter and the result, whether an electoral college or an arbitrary division of a State, tend to diminish the voting power of the individual voter. The proposed method not only overcomes that evil, but operates to equalize the ballots of all voters,

even in view of the final result. Every citizen who shall go to the polls to vote for either President or Vice-President will be possessed of the consciousness that his ballot is no longer in danger of becoming a cipher, when the vote of his State comes to be counted, but is sure to enter as a dynamic unit into the ultimate choice of his State and can be neither nullified nor impaired. Even if it do not enter into the larger or the smaller ratio of the electoral strength of the State in quantity sufficient to gain a single presidential vote, it is no longer in danger of absolute annihilation, and its decimal strength, added to the presidential units cast for the same candidates in other States, may co-operate towards an ultimate triumph. Under the present system of voting, whether for electors, State officers, members of Congress, or other officials, when the canvass comes to be made, every citizen who has not voted for the winning side perceives that, so far as immediate results are concerned, he might as well not have voted. Under the proposed method this can never happen in the ascertainment of the will of the State, for each party is to receive its due share of the State's presidential votes. No other system so completely preserves the equality of the States. A new dignity is thus imparted to the State; it is an integer, separate from its sisters, in the election of President; and every citizen of the State knows that the subtraction of his vote would make a difference in the result, and that the voice of the State, as ultimately proclaimed, is the direct sum of all the individual voices throughout the commonwealth. A new and higher theory of the State<sup>1</sup>

<sup>1</sup> The true conception of the State is not that it consists of a majority or a plurality of the people at any time in control of its administrative and legislative departments. The State is the abstract of all the people who compose it, although it usually acts through agents elected by only a portion of its citizens. A State is as much a federation as is a republic of States. Under the contrary doctrine all governmental functions should be absorbed in a central authority. The preamble of almost every State con-

rises into conception, while there is also recognized a dominating will of the central authority, the expression

stitution recites that the instrument is the work of the people of the State ; the people ratify a constitution before it becomes effective, and, in every State, the people may amend it through conventions to which they elect delegates. The Legislature of any State has the constitutional power to declare that the choice of presidential electors should be determined in such a manner as is herein proposed.

That a State is not a majority of the people, but the entire people, was well shown in the celebrated case of *Texas vs. White*, 7 Wallace R., 700, 721, where Chief Justice Chase, after stating the various significations attached to the word,—of a people or community of individuals united more or less closely in political relations, inhabiting the same country ; of the country or territory itself ; of the government under which the people live ; and of the combined idea of people, territory, and government, says : “ In all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the State. . . . A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned by a written constitution, and established by the consent of the governed. . . .

“ And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or a political community, as distinguished from a government.

“ In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.”

And in *McPherson vs. Blacker*, Chief Justice Fuller, speaking for the highest tribunal of the nation, in answer to a like criticism against the adoption of the district system in Michigan, said : “ The act of appointment is none the less the act of the State in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the view of the State, a result reached by direction of the Legislature, to whom the whole subject is committed.”

The majority report of the Southard committee is therefore sound in its declaration : “ The State and the people who compose it are virtually one and the same. . . . For all the purposes of domestic government, the people, theoretically and practically, constitute the State, although in a technical, legal sense, the organized body politic is recognized as such.”



of the resolve of a majority or plurality of all the States composing this imperial republic. Those who, like Senator Edmunds, object to the district system as obliterative of State lines must recognize that the proposed substitute for the present system preserves the State as an entity. Never has a State, in the sense of the citizenship of which it is composed, been adequately represented in a presidential election. When electors were appointed by the Legislature, there was a suppression of a large section of citizenship, the minority party, whose ballots were more than counterbalanced in the Legislature by the ballots of their opponents. Under the district system, which was never in uniform operation throughout all the States, there was the equally despotic control of the majority in the district, and the district was itself an arbitrary subdivision of the State. Under the general-ticket system vast masses of citizens have in effect been disfranchised even by their inferiors in numbers. To all such injustice there will be an end and the ballot will gain a new meaning and importance upon the adoption of the proposed method.

Inasmuch as the State should control its own count, and is to fulfil the same function as under the present Constitution, although much more perfectly, the State should, as at present, decide upon the qualifications of its voters. There is no occasion for any departure from the plan of the original Constitution, no reason for drawing under the jurisdiction of the general Government questions touching the qualifications for suffrage of citizens who vote for President. The lines of demarcation between State and Federal authority should be drawn with the strictest precision. Were the existing system otherwise flawless, the limitations could be plainly made. The appointment of electors and the deposit of their votes are absolutely under State control, but from the moment when the returns are transmitted to Washing-

ton the subject passes under exclusive central control. Equally sharp distinctions are attainable under the proposed system. It would make the simplest change in the present Constitution, although a radical one. While it fully preserves the meaning and intent of that instrument, in all other respects save in regard to electors, whose office it abolishes, it is based, like all other provisions of the organic law, upon prior experience. It provides for a true arithmetical count and a declaration that shall be final and irreversible, for the title to the office of the President must never remain in suspense for an instant.

How, it may be asked, is the evil of multiple returns to be averted? None such can ever come, unless there should be rival State governments in the same commonwealth, as when both Kellogg and McEnery claimed the governorship of Louisiana. The danger in the present system from the caprice of voters is also avoided. Should some sectional or socialistic feeling prevail in a number of States, it might, with slight aid from more rational sections, control the presidency; whereas, while a plurality candidate is a possibility under the proposed system, the successful candidate is far more likely to reflect the actual sentiment of his party. Had such a system been in existence prior to the Civil War every Southern citizen whose affinities lay with the Republican party would have found opportunity to express his sentiment at the polls effectively and without danger of ostracism, since his ballot was secret. The South would have been taught to respect the strength of its minorities, and have been enlightened as to the intensity of antagonistic feeling in other States where similar ideas were in a minority. In result the course of events might easily have been modified.

It is an elementary proposition of mathematics that there is far more probability of an equality within the

State in the division of electoral votes than in the division of the popular vote of the State. The nearest approximation in the history of the nation to equality of the popular vote for candidates for the presidency occurred in Maryland in 1832, when Clay's popular vote exceeded Jackson's vote by four. It may be that there never was this close approximation, for the vote for Wirt may have been included in the returns for Clay. Inspection of election statistics shows a number of fairly close approximations, but no instance of equality in the popular vote of a State for different candidates, through an entire century. Hence the likelihood of an equal division of the total popular vote of a State among two or more candidates is very remote. The probability of an even division of the electoral vote occurring at the same time with an even division of the total popular vote either of a State or of the nation is much more remote; hence the danger of tie votes is reduced to a minimum. Wherever the number of presidential votes throughout the country is an odd number the danger of an equality of division is, perhaps, less than when that number is an even number.

If two or more candidates having the highest number of presidential votes throughout the country should have also an equal number of such votes (which might as easily happen under the proposed as under the existing system), the presidency is to be allotted to the candidate who has the largest popular vote throughout the entire country. There could be no difficulty in making a selection under this plan. Every certificate sent from a State to Washington would contain, first, the total popular vote of the State, second, the number of popular votes for each candidate, and, third, the apportionment of the State's presidential vote among such candidates, assigning to each a fraction of a per cent., however small the fraction may be, provided it be not less than the equivalent of three or four decimals. Wherever two or more candidates

have the highest number and the same number of presidential votes, and also, as is improbable, an equal popular vote, the popular vote for each must also be certified. Inasmuch as every new State will have been recognized as a State before the popular election, there is no need of providing, by constitutional amendment, a definition of a State. Heretofore the difficulty in determining whether a community had a right to be considered a State has arisen from the fact that, at the time of the popular election, the community was a Territory, but had become a State when the electors convened to make their choice for President and Vice-President or when the electoral count took place. This dual election occasioned the controversy. The abolition of the dual election simplifies the question. Unless a community is a State, recognized by Congress and the executive department on the day when the people vote, her citizens are to have no voice in the selection of a President or Vice-President.

All contests must be settled within the State, for they are exclusively matters of State concern. Here, again, the independence of the State is conserved. Under the present Constitution, contests may be matters partly of State and partly of national interest. The State appoints the electors; the electors convene within the State and vote. Controversies over their appointment, *i. e.*, as to the number of votes for them, should be settled by the States themselves. The title of the elector, his eligibility to the office, may be, and, I think, properly is, a matter of national interest, although the divergent opinions of statesmen indicate that such questions may legitimately come before either a State or a Federal tribunal.

Under the suggested system the national Government would be concerned with nothing beyond the proper certification and transmission of the returns, until they are opened in the joint meeting of the Houses. If an ineligible candidate should be voted for, which is

extremely improbable, it would be the duty of the State canvassing officials to report the fact, together with the number of popular votes for such candidate and the ratio of the electoral votes affected; and these votes should be discarded in the final count. But there is as little likelihood that any party will nominate an ineligible candidate as that the popular election will not be held on the appointed day. The abolition of the electoral college would permit of a longer period (if that should be decided upon as desirable) for the adjustment of controversies within the State. It would be sufficient if they were all determined before the second Wednesday of February, which allows an interval of more than three months after the election to ascertain how the people of the State have voted. The probability that any contest would arise in a State is reduced to the lowest possible minimum, because the temptation to fraud, bribery, and false certificates of all sorts is greatly reduced. A close district, under the district system, might be contested by one party or the other. The temptation to party managers to make the fight in close or doubtful districts is peculiarly seductive. In fact, as Edmunds says, the district system would increase the possibility of disputes over returns, by making the number of returns as large as the number of districts. A close State might occasion controversy when the total vote of the State was to be swung to one party or the other under the general-ticket system. Inasmuch as under the proposed system every vote in the State is to count, and as the presidential votes of the States are to be divided in the ratio of the respective records of the popular vote, there could be no incentive to controversy, unless (something extremely unlikely) two or more candidates should have such a closely approximating popular vote as to imply that there had been corruption or bribery.

Congress should make complete and ample provision

for the certification of the vote of each State and the apportionment of electoral votes among the candidates. The liability to mathematical error in all matters to be certified by the State authorities is so slight that it may be disregarded. It should be made the duty of the State officials to authenticate returns by appropriate certificates, and a serious penalty should be imposed upon disobedience or neglect.

Bearing in mind the various questions that have arisen in the history of the electoral count, I venture, in the light of the different suggestions that have been made and of the foregoing explanation, to propose an amendment, as follows:

#### ARTICLE XVI

*Resolved*, by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is hereby proposed as an amendment to the Constitution of the United States and when ratified by the Legislatures of three-fourths of the several States shall be valid to all intents and purposes as a part of the Constitution, to wit:

1. That hereafter the President and the Vice-President of the United States shall be chosen directly by the electors of the respective States having the qualifications by the laws thereof requisite for the electors of the most numerous branch of the State Legislature, and in the manner following: Each State shall be entitled to a number of votes in the election of the President and also of the Vice-President equal in number to the whole number of Senators and Representatives to which the State may be entitled in the Congress of the United States, which votes shall be called presidential votes and vice-presidential votes, as the case may be. Such election shall be

held upon a day to be designated by Congress and shall be the same day throughout all the States.

2. The presidential votes to which each State shall be entitled shall be apportioned among the persons receiving the votes for President of the duly qualified electors of the State in proportion to the number of votes such persons shall respectively receive in such State, to be ascertained by dividing the total number of votes cast by the qualified electors of such State voting for each of such persons, by the total number of votes cast by all the qualified electors of the State voting for all such persons, and allotting to each of such persons such proportion or fraction or decimal portion of the presidential votes of the State as is represented by the ratio of the total number of votes cast for him by all the qualified electors of the State to the total number of votes cast by all the qualified electors of the State voting for all such persons.

3. The person receiving the highest number of presidential votes, including, if such there be, decimal parts of presidential votes, in all the States, shall be President, and shall be declared to be such in the manner hereinafter provided.

4. If two or more of such persons shall receive the highest and an equal number of presidential votes, including decimal parts of presidential votes in all the States, that one shall be President who shall have received the largest number of votes, in the aggregate, of all the qualified electors for President in all the States. If two or more such persons shall receive the highest and an equal number of presidential votes, including decimal parts of presidential votes in all the States, and shall also have an equal number of votes in the aggregate of all the qualified electors for President in all the States, that one of such persons shall be President who shall have received the largest number of votes of the qualified electors in the greatest number of States.

5. The total number of votes cast by the qualified electors of each State for each such person at each presidential election shall be ascertained and determined as soon as practicable by the canvassing authorities of the State duly constituted by the laws thereof as the canvassing board or officers of such State, and certified to be such by the chief executive of the State. And by such dates as Congress shall prescribe lists of such returns shall be made by such canvassing authorities in triplicate, all of which sets shall be duly signed and certified by them, and one shall be transmitted to the president of the Senate; the second to the speaker of the House of Representatives; and the third shall be filed in the office of the Secretary of State of the United States; but all such lists of returns shall state: (1) The aggregate number of votes for all such persons cast by the duly qualified electors at such election; (2) the total number of votes for each such person cast by such duly qualified electors; (3) the number of presidential votes of the State, including decimal parts of such votes, apportioned to each such person, according to the principle of apportionment declared in this article. All such returns shall be duly certified under the great seal of the State and by the chief executive thereof.

6. The president of the Senate shall, except as hereinafter provided, open one set of all such certificates and shall count the presidential votes returned therein in the presence of the Senate and the House of Representatives with the aid of two tellers to be appointed by each House. The person having the greatest number of presidential votes, including decimal parts of such votes, in all the States, shall thereupon be declared the President of the United States; and if two or more persons have the highest number and an equal number of presidential votes, including decimal parts of such votes, in all the States, that one shall be declared the President of the United



States who shall according to such returns have received the largest number of votes in the aggregate cast by the qualified electors for President in all the States. If two or more such persons shall receive the highest and an equal number of presidential votes, including decimal parts of such votes, and shall have also an equal number of votes in the aggregate of all the qualified electors who shall have voted for President in all the States, that one of such persons shall be declared President who shall have received the largest number of votes of the qualified electors in the greatest number of States. If the president of the Senate shall be one of the persons voted for, the Speaker of the House shall preside and shall declare the result, unless the Speaker shall be one of the persons voted for, in which event the two Houses in joint meeting voting *per capita* shall select the presiding officer.

7. All controversies or contests over the votes cast in any State by the qualified electors of such State for any person eligible to be President shall be determined according to the laws of that State by the tribunals thereof; and all such controversies or contests shall be finally determined before the date which shall be designated by Congress when the certificates shall be opened as prescribed in section 6 of this article. If any decision by the highest tribunal of said State having jurisdiction under the laws thereof, upon any controversy or contest affecting the returns, shall have been rendered after the transmission of the lists of returns, a copy of such decision exemplified or authenticated in such manner as the Congress shall prescribe, if transmitted as said lists of returns are required to be transmitted, and before the final count prescribed in section 6 of this article, shall govern in such final count.

8. The foregoing provisions shall also apply to the election of Vice-President, but no qualified elector shall

vote for persons for President and Vice-President who shall both be inhabitants of the same State with himself, or his vote shall be null and void. And every vote by such elector for a person ineligible by the Constitution to the office of President or Vice-President shall be null and void.

9. The Congress shall have power to enact such legislation as may be necessary and proper for carrying into effect each and all of the provisions of sections 5, 6, 7, and 8, respectively, of this article, and may prescribe appropriate penalties for the violation of said provisions or any of them.

10. In case of the death or inability of a President-elect, or his renunciation of the office of President, the Vice-President-elect shall become President, and the Congress may by law provide for the case of the death, or inability of both the President-elect and the Vice-President-elect, and the renunciation by both of their respective offices, and shall declare what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected. The Congress shall also have power to prescribe what shall constitute inability of the President or of the Vice-President, President-elect or of the Vice-President-elect, and in what manner and by whom such inability shall be determined.

Section 1 determines what voters may ballot for President and Vice-President, and it uses, in describing these voters or electors, the language employed in subdivision 1, of section 2 of Article I., which provides who shall have the right to vote for Representatives. Section 2 is in accordance with the theory which has been advocated in this chapter that each voter should be an actual factor in the ascertainment of the division of the presidential votes to which his State is entitled. Section 3 needs no explanation. The purpose of section 4 is to

settle all possible controversy or dispute in case of a tie. There might readily arise a tie in the present electoral colleges, and two or more candidates might easily have the same number of presidential votes even if the colleges should be abolished. But, as has heretofore been observed, it is highly improbable that any two candidates having the highest and an equal number of presidential votes would have an exactly equal number of votes of the electors in all the States. If such an improbable contingency should arise, the section assures the election of some one of the candidates, by providing that that one shall be President who is the choice of the larger number of States in addition. The provision in section 4 giving the presidency, in case of a tie in presidential votes, to that one of the two candidates who has the largest popular vote in all the States, is of value also in tending to secure the fullest party vote in every State. Since the election may turn upon the size of the vote, each party will aim to bring out its full strength. The solution of a tie vote is thus made instrumental in obtaining votes. The purpose of section 5 is to solve the difficulties which have arisen regarding the count and canvass of electoral returns. I have already stated that under the proposed system the possibility of disputes will be reduced to a minimum. The summation of the votes cast for different candidates by the electors in the different States can readily be made, and only when the number of votes for two or more candidates closely approximates is there any likelihood of dispute or question. But such disputes cannot be prearranged, as might readily happen with small districts or voting areas, and all incentive to dispute is removed. In order to avoid the possibility of multiple returns, provision is made that the canvass in each State shall be made by definitely designated canvassing officials, and unless there be two co-existing State governments in a commonwealth there cannot be more

than one such canvassing body at any one time; and to authenticate the returns of this body as the canvassing authority, the certificate of the executive of the State is required. The details which are to be inserted in the returns are absolutely necessary to a correct enumeration or count at Washington, and they contain nothing more than may be essential. If the successfulness of the proposed method be tested by the disputes which arose in the case of the conflicting returns from Florida, Louisiana, South Carolina, and Oregon, in 1877, it will be found, I think, that the possibility of dual returns is obviated. In the Florida case the three sets of certificates transmitted from that State were all differently authenticated. The first, which contained the return of the Hayes electors, was authenticated by Governor Stearns, who was the chief magistrate of that commonwealth at the time of the popular election. The second and the third were authenticated by Governor Drew, who took office on January 1, 1877. These last two sets of certificates were in effect one, both having been sent to maintain the claim that the Tilden electors had been elected. In the Louisiana case there were also three sets of certificates, the first and the third asserting the title of the Hayes electors, and the second that of the Tilden electors, the first and third having been authenticated by the governor of the State in office at the time of the popular election, and the second by McEnery, who claimed to have been the governor at such time. The first of the two Oregon certificates was not authenticated by Governor Grover, the chief executive at the date of the popular election, but by the secretary of state, who claimed to be the sole State canvassing officer and whose title to that position was upheld by a majority of the commission. The second return was, in fact, authenticated by Grover, but was not predicated upon the action of the State canvassing authority. In the case of South Carolina, Governor Chamberlain attached

his certificate to the lists transmitted by the Hayes electors, whereas the second certificate had no such authentication. So long, therefore, as separate State governments are not asserted to exist in any community, there can be but one set of State canvassing officials recognized by the laws of that State at any particular date. There is but one date possible, the date of the return. No provision is made in the proposed amendment for the case of dual State governments, for several reasons: First, that it does not comport with the dignity of an amendment to the Constitution that it shall recognize the possibility of such an anomalous condition of affairs in any State as a conflict between separate governments; second, because of the extreme unlikelihood of the recurrence of such conditions as prevailed in 1877; and third, because, under the proposed plan, the incentive to conflicting returns by separate State executives is removed and the possibility of such conflict eliminated. Inasmuch as all returns are to be certified under the seal of the State by its chief executive, the Government is furnished with the highest possible authentication of the jurisdiction of the State canvassing board. In the event of a contest or controversy which shall modify or alter the returns as originally transmitted by the State canvassing authority under executive authentication, it is equally necessary that the final judgment of any State tribunal recanvassing these returns should be authenticated, but that is a detail for congressional legislation. It is difficult to perceive how any controversy as to the returns can be carried to the general seat of government, except in the sole contingency of the existence of rival State organizations. If a State should be in such a condition of anarchy there might well be a provision (which has been omitted) that the returns from that State should be altogether discarded. The disfranchisement of the State would thus be the consequence of its own acts and would not result

from the arbitrary decision of the two Houses of Congress, or of either of them.

The provisions of section 6 are designed to reduce the count at Washington to the simple task of enumeration,—which is in accordance with the theory of the founders of the Constitution,—and the declaration of the result. Tellers are to be appointed by each House to aid the president of the Senate, who might find the duty of making the enumeration too burdensome, and the provision for tellers gives each House that kind of surveillance over the ceremony which the original Constitution probably intended that the Houses should exercise. To avoid the danger—which under the proposed system seems almost infinitesimal—that the president of the Senate, if a candidate for the place of chief executive, might be swerved by unworthy motives from the correct performance of his simple duties, provision is made for the substitution of the Speaker of the House or, should the Speaker of the House be disqualified for like reasons, for the appointment by the two Houses in joint session of a temporary presiding officer. As was well said by several of the majority members of the electoral tribunal of 1877, there must come a time when disputes over the presidential succession shall terminate, and the final determination must be reached before the 4th of March. Hence the count at Washington is declared to be a finality, and the impressive ceremony of a declaration or announcement is required; and in order to remove all possible question, the amendment proposes in section 7 that controversies or contests shall be settled by the States themselves. This is plainly in accordance with the theory of the present Constitution and was certainly the doctrine of the majority of the Electoral Commission of 1877, if not of all its members.

To avoid such a question as arose in Arkansas in 1873, —whether a State has a great seal,—the Congress might

prescribe that every State shall have a seal for the purpose of authenticating its returns, and might require the deposit of a facsimile or an appropriate description of the seal in the office of the Secretary of State at Washington. The States are to make their choice of President and Vice-President with absolute freedom from interference by the general Government, while Congress is authorized to compel by legislation a proper and unquestionable certification of results.

In order that there may be no question whether the constitutional prohibition in section 8 is self-executing, the section provides that a ballot cast by a qualified elector for a President and a Vice-President, both of whom shall be inhabitants of the same State with himself, or a ballot cast for a candidate disqualified by the Constitution because of lack of age or of citizenship, shall be null and void; and, in view of the discrimination between the powers that belong exclusively to the State and those properly vested in Congress, section 9 gives Congress power to enact the necessary legislation for carrying into effect the provisions of those sections, and those only, with whose operation the central authority is concerned. Thus the amendment preserves the separate and exclusive sphere of State action from encroachment by the general Government, and gives to each qualified voter of the State that measure of electoral influence to which under any fair system of suffrage he is entitled. The useless and dangerous office of presidential electors disappears, with all of the numerous controversies over their appointment, their title, disqualifications, the existence of vacancies, the right to fill vacancies, etc. The abolition of the electoral colleges of itself wonderfully tends to a clear and sharp demarcation between State and governmental functions in the choice of President. There is nothing revolutionary in these suggestions; they all harmonize with the fundamental theory of the Constitution, and aim

simply to insure that certainty in a presidential election which is of the highest importance in the interest of order and tranquillity.

The substitute election in the House, which has been the bane of our politics, is abolished. The new system, it is true, permits of the election of a minority President, but so would all amendments that have ever been proposed. The objection of the States represented in the convention of 1787 to the choice of the chief magistrate by less than a majority of all the appointed electors, or less than a majority of the States in the House, was founded in fears that experience has shown to be groundless. As was said by the Senate committee of 1874, to whose report frequent allusion has been made: "The President elected by a plurality of all the votes in a fair election would carry with him the whole moral power of the office and be regarded by the nation as completely the President morally and legally as if he had received a majority of all the votes." The objections which apply to the election of a minority President in the electoral colleges or in the House of Representatives have no significance where the choice is made directly by the people, who have become familiar in their respective States with the plurality method of electing State officers, members of Congress, members of the State Legislature, and city, county, and town officials. Nothing can be added to the admirable argument of the Senate committee upon this point:

"Where the plurality system is adopted, and the people vote directly for candidates and not for electors or intervening agents, every man casts his vote with a knowledge that the candidate who receives the most votes will be declared elected. There can be no inducement, therefore, to scatter the vote with a view of throwing the election into the House, as there may be under the present system; and every voter will have



strong inducement to give his vote for the best man, knowing that the result of the election is to be final.

"In the States where the election of governor and other State officers by the direct vote of the people is conducted on the plurality system, it happens in a majority of cases that the officers elected actually get a majority of all the votes cast, but where they do not receive a clear majority it nearly always happens that their vote approaches very closely to a majority, and is generally a fair expression of the wishes of the people; and we have never known a case of the election of governor or other important State officers who had not received one-third of the votes, as was the case with Mr. Adams, in 1825, who was made President through the machinery of the election in the House.

"Whatever objection may exist to the plurality system, where the people vote directly for candidates for President and Vice-President, must prevail with tenfold force under the electoral system, for under the electoral system it is quite possible, and even probable, that the man may have the majority of electoral votes who is largely in the minority in the popular vote. Under the plurality rule no man can be elected who has not received more votes than any other candidate; but under the present system a man may be chosen President who receives the smallest number of votes, by means of the electoral college or throwing the election into the House.

"It may be further remarked, that while there can be no election of President under the present system except by a majority of all the electoral votes, yet the electoral colleges themselves in the several States are, and have been from the first, chosen upon the plurality system, and are not in any case required to have a majority of all the votes cast in the State."

Section 10 differs from the article of amendment in the joint resolution offered in the Senate in 1898 by Senator Hoar from the judiciary committee of that body. The amendment of the judiciary committee was a modification of the amendment suggested by Mr. Paine, of Maine, and read as follows:

"In all cases not provided for by Article II, clause 5, of the Constitution, where there is no person entitled to discharge the duties of the office of the President, the same shall devolve upon the Vice-President. The Congress may by law provide for the case where there is no person entitled to hold the office of President or Vice-President declaring what officer shall then act as President, and such officer shall act accordingly until the disability shall be removed, or a President shall be elected."

The resolution passed the Senate by a two-thirds vote and was referred to the House committee on the judiciary, but never reported from that committee. On December 4, 1901, Senator Hoar again introduced the resolution, which passed the Senate and was sent to the House of Representatives, where, on February 1, 1902, it was referred to the House committee, but never afterwards heard of. The resolution as twice passed by the Senate did not escape criticism in that body. Rawlins, of Utah, queried as to the scope of the word "entitled." Might not that word, he asked, involve the question whether the person claiming to be elected President was an alien-born person, or whether the person claiming to hold the office was lawfully elected thereto? If so, the amendment was too broad in its scope. Hoar, in defending the committee's resolution, admitted that the use of the word "entitled" had been much discussed in the committee. While the word was not altogether satisfactory, the consensus of opinion favored it as the best that could be found. The joint resolution introduced by the Senator from Maine and prepared by his constituent was, said Hoar, intended to meet the case of the death of the President-elect after the meeting of the electoral colleges and before inauguration; but there was "no provision in it for the case of a failure to elect either or both the President and Vice-President." Such a failure had very nearly happened in the case of the great contest between Burr and Jefferson and might very well

be expected to occur again. The word "entitled" has a wider significance than the judiciary committee intended. But inasmuch as the amendment to the Constitution suggested in this chapter abolishes the House election, and is designed to obviate the possibility of a failure to elect, it is unnecessary in section 10 to cover the wide field which the Senate amendment proposed to include. It is sufficient to provide for the contingency of the death of the President-elect or the Vice-President-elect, or of both. Thus the troublesome question raised by Rawlins respecting the Senate joint resolution of 1898 is eliminated because the need for such an amendment is dispensed with. Section 10 follows closely the language of the present Constitution in respect to the death of the President and the Vice-President, broadening that provision to embrace the case of the President-elect and the Vice-President-elect. It remains for Congress to define inability by adequate legislation, and to provide for the effectual execution of the proposed amendment in other particulars, by a comprehensive statute framed in the light of experience.

To try to restore the electoral scheme of the fathers would be a chimerical undertaking. To attempt the creation of any plan in conflict with the plain trend of institutional development would be equally unwise. Nothing in the suggested amendment is at variance with the fundamental principles of the Constitution, save that it would abolish the useless and dangerous electoral system. The States are to be maintained in all their integrity. No concession is demanded from smaller commonwealths, against which some concession from the more populous States should be offset, but the rights of all the States, small and large, under the organic law are preserved inviolate. While the electoral representation of each State is to remain intact, the individual voter in each State is given his due share of influence. Voting is

made direct; unnecessary, obsolete, and perilous machinery is discarded, and the final electoral count at Washington is so simplified that it becomes a mere computation to be followed by a declaration of an unimpeachable result. Under such a plan it would be easy to obey the constitutional dictate, "the votes shall then be counted." The States would gain in dignity, citizenship would be exalted, political convictions would find freer expression, geographical and sectional differences would vanish, and minority sentiment obtain its due share of influence. The proposed system would tend to emancipate the voter from the thralldom of party, promote independence, and open avenues for direct nominations by the people. Under such a system it would become possible for the voter to enjoy a vital and not a merely nominal power in the selection of candidates.

The caucus and convention have usually left the voter merely a barren choice between candidates. No other method that has been proposed would give each citizen so much influence over the *personnel* of the men to be nominated, because none other gives so much weight to the individual ballot. There are but two cardinal facts for the independent voter to remember when he comes to the polls,—not to vote for two candidates both of whom come from the same State as himself, and not to vote for a candidate disqualified for the office under the Constitution.

The purpose of the foregoing discussion has been to explain the perils to the nation's peace and well-being that grow out of the electoral system. Few persons who have any just appreciation of the constitutional plan fail to condemn it as useless, yet a large number of those who concede it to be obsolete paradoxically regard it as harmless. Their criticism of such an historical study is likely to be that theoretical arguments against the present system are of little value in comparison with the many practical evidences of the failure of voters to comprehend the

electoral ballot; but this is to lose sight of the main intent,—that the system should be abolished, because it has been and is in itself a source of positive danger. The history of the operation of the electoral machinery shows that this vicarious method of choosing a President is beset by difficulties and perils, which, numerous as experience has shown them to be, have not exhausted their malign possibilities. Those who regard the electoral colleges as merely useless, and who would not lay profane hands upon the sacred ark of the Constitution, need to have the lesson emphasized that the system is fraught with dangers and that it is the one vulnerable feature of the organic law. At the outset is the liability to error in the selection of electors. Names of persons constitutionally disqualified to hold the office have been placed upon the electoral ballot; errors often creep into the printing of the names, and with the wide diffusion of the Australian-ballot system voters are found to be inept in marking the candidates of their choice. As Morton once said: "While nobody would mistake the names of Grant or Greeley, changes in the names on the long list of electors may occur from errors in printing or fraud sufficient to reverse the vote of a State." The liability to error would be reduced to a minimum if the voter were to vote direct for Cleveland or Harrison, Parker or Roosevelt. Ignorant voters have often erased from the ballot the names of electors offensive or unknown to them, thereby unconsciously impairing, if not vitiating, their vote. A system which allows so large a margin of erroneous votes stands condemned by the possibility that the election may turn upon the ignorance of voters, and not upon the popular will.<sup>1</sup> The expense of canvassing is increased by count-

<sup>1</sup> The New York *Evening Post*, in an editorial on "The Useless Electoral College," recently said: "Under the extraordinary ballot law [of Florida], the names of these twenty electoral candidates were printed in a close column one below the other, with no line or space to separate the parties; and no name, emblem, or other indication to show by which party

ing a large list of electoral candidates: and when the returns have been completed, there arises the possibility of contest over disqualified electors. The law of 1887, by enlarging the interval between the date of the popular election and of the assembling of the electoral colleges, —with the beneficent purpose of allowing adequate time for the determination of *bona fide* controversies,—incites to the creation of spurious contests, by furnishing a generous measure of time for partisan animosity or disappointed ambition to conjure up false issues. Neither State nor congressional legislation has yet determined whether the prohibition of the Federal Constitution against electors disqualified by its provisions is self-executing, or whether a *de facto* elector, appointed in disobedience of the nation's organic law, becomes, by the fact of his election by the people in ignorance of his ineligibility, an elector *de jure*. Controversies over electors will never be causelessly initiated, for the American mind is eminently practical, but should the nation's vote hereafter hinge upon the question of the eligibility of electors, it cannot be predicted whether the State primarily concerned will try the question of title, or whether the trial will be completed before the day fixed for the meeting of the electors, or the question be reopened in the joint meeting of the two Houses, as would seem to be authorized by the Act of 1887; nor can it be predicted

each candidate was nominated. The Democrat had to mark the first five; the Republican, numbers six to ten inclusive; the Populist, numbers eleven to fifteen inclusive, and so on. Naturally, a very large number of voters were muddled, and, in fact, 900 Democrats out of 27,046; 1650 Republicans out of 8314; 689 Populists out of 1605, and 1086 Socialists out of 2337, failed to mark all the electors of their parties. . . . In Maryland, where a square for voting all electors at once on the ballot is similar to and immediately above that for the first elector, 2504 Republicans made the mistake of voting for elector number one only, and that margin was wide enough for seven Democratic electors to come in, although it is indisputable that more Marylanders tried to vote for Mr. Roosevelt than for Mr. Parker."

upon what principles a contest would be settled. The subject of filling vacancies in the electoral colleges suggests many perturbing inquiries. If an appointment were void *ab initio*, would a vacancy exist? If an elector should die on or before the date of the popular election, would a vacancy be created that an electoral college might fill? The statutes of the States differ in their phraseology as to the filling of vacancies, and may be variously construed. No tribunal, State or Federal, exists to solve any of the numerous perplexing questions, and if another disputed election should occur either Congress would arbitrarily settle the dispute by a species of *ex post facto* legislation, or the two Houses would be deadlocked in a hopeless antagonism of opinion. The danger of fraud, corruption, or abuse of trust on the part of an elector will be perennial, for evidence of past good faith ensures no immunity for the future. As the number of States increases, the expense of convoking electoral colleges grows more burdensome, and the chance remains that a disaster such as befell Wisconsin in 1857 may be repeated. One catastrophe might sweep away all the members of an electoral college, leaving no one to supply their place. Furthermore, the temptation to create new States for partisan purposes, so potent of late years, would cease under the proposed system. Again, rival electoral certificates might reach the national capital, and while there would remain the possibility of discordant claims regarding the vote of a State, the chances of conflict would be greatly diminished. The whole subject of the electoral count at Washington is involved in difficulties, and although momentous consequences may depend upon the settlement, all questions must be determined without debate.

Other defects exist in the provisions of the Constitution touching the election of President, and the necessity for the removal of these defects reinforces the argument

for amendment. Apart from the question of the power of Congress to concentrate in itself by disfranchising States the final right to choose a President; aside from the enigma that has perplexed the statesmen of every epoch—how to provide an umpire when the two Houses disagree as to the reception of the vote of a State,—a question of the highest import arises at the threshold of the electoral structure. Has the Federal Constitution, in prescribing that each State may appoint electors in such manner as the Legislature of the State may direct, so exalted the law-making body of the State above the State and its people that the Legislature may defy the injunctions of the State constitution and appoint electors in any manner it may please? The Legislature of any State in the Union may at any time, said Morton, take away from the people of that State the privilege of voting for presidential electors, and no provision of the State constitution can successfully prevent it from doing so. Morton's colleagues upon the Senate committee that reported the proposed constitutional amendment of 1874 evidently agreed with him, for the view of the committee was that

“the appointment of electors . . . is conferred upon the Legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States, and that under the Constitution as it now stands it is in the power of any legislature to repeal all laws providing for the election of electors by the people, and take such election into their own hands. It may be said this is not likely to be done; but the answer is, that it may be, and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do.”

To be chosen by the electors a candidate must have a majority of the electors who have been appointed, and if



no one has such majority, the House is immediately to proceed to the election, but is to vote by States. What body is to decide who are the duly appointed electors or whether a candidate has the suffrages of a majority of such electors? Again, what authority is to determine when the moment has arrived for the exercise of the constitutional obligation reposed in the House to make the choice of the chief executive? The "reticence" of the Constitution is not only perplexing, but perilous as well. In the light of its Delphic brevity, it is not remarkable that entire control over the electoral count for President has been claimed for the House alone, on the ground that, unless it have this power, it can never decide when its function of President-maker is to begin. The outgoing not the incoming House makes the choice. The choice is by States. The injustice of this method of choice has frequently been exposed and the method has found few defenders. It enables States representing a minority of the population to choose, and the selection is entrusted to a House that may be in the control of a party defeated in the preceding election. As two-thirds of the States are needed for a quorum, a revolutionary body could defeat any election. Only once since the passage of the Twelfth Amendment has the election devolved upon the House and if the testimony of historians and statesmen is to be credited, no one wishes to see an occasion arise for invoking this method again. Twice in the history of the country have there been prominent candidates threatening so to divide the electoral vote as to prevent any one of them from having a majority. This actually happened in 1824, and might easily have occurred in 1860. It is a mathematical possibility, and not a remote probability, that four candidates should have an equal share of the electoral votes, or that there might be a tie between the third and fourth, and no candidate have a majority of the votes.

If such an exigency should arise under the existing Constitution, no easy solution would be attainable; apparently there could be no election whatsoever, for the Constitution would permit the House to vote for only three candidates, although all four would morally be equally entitled to ballots in the House. If the last two should both be treated as within the category of the highest three, who could be voted for if three or four candidates had the same number of votes? Should those having the same number of votes be treated as one in effect in order that two other candidates might be permitted to enter the contest? Would the Vice-President-elect, in such a case, become President? But if more than two candidates for the office of Vice-President should have the same number of electoral votes, the Senate would be paralyzed, and could not constitutionally proceed with its elective functions.

If the President-elect should die or become mentally impaired before assuming office, the question would at once arise whether the Constitution provides for such a contingency, and the doubt expressed as to the meaning of "inability," and how inability itself is to be determined, offers some idea of the divergences of view that would arise in such a case. My own opinion is that an amendment is necessary to cover this contingency.

If the electoral system should be abolished, how is the presidential election to be held—shall State independence be so far surrendered as to permit the people of the nation to vote *en masse* for the chief executive? Such a change would be revolutionary. The inquiry whether it would be desirable is rendered unnecessary by the simple fact that the requisite number of States would never consent. It is useless to think of securing the approval, by three-fourths of the States, of an amendment which would deprive them of their present influence as independent entities in the Federal republic. Twelve States

could defeat the proposition; hence it should be dismissed as illusory. Chancellor Kent, in opposing the extension of the suffrage in the New York constitutional convention of 1821, eloquently said that if the enlargement were made the privilege could never be recalled, for "there is no retrograde march in the rear of democracy." So, likewise, the power at present reserved to the States by the Constitution will never be voluntarily surrendered. The small States will never consent to immolation or agree upon any self-denying ordinance.

The only other modes of election that preserve the rights of the States are the general-ticket system, the district system, and the apportionment plan, with an assignment to each State of the same quota of electoral influence as it now enjoys through its electoral college. I have heretofore traced the rise, and pointed out the defects, disadvantages, and gross injustice of the general-ticket system of appointing electors,—a system that ever since its adoption has been condemned by statesmen of the rank of McDuffie, Benton, Van Buren, Morton, by numerous writers upon constitutional law, and by no one more convincingly than by Madison. Its effect has been to stifle the voice of minorities, to develop a class of pernicious leaders in the different States, to create what have come to be known as "doubtful" States, to reduce the election merely to a contest in such States, and to aggravate the tendency to the commission of frauds of all sorts upon the ballot-box, with resulting debauchment of the electorate and debasement of the exalted privilege of suffrage. So long as the States control the appointment of presidential electors, which they will continue to do until the Constitution shall be amended, uniformity in the method of appointment is not assured of perpetuation, for political exigencies may bring about a change in any State at any time, and the constitution of a State, in the judgment of some of our ablest public men, cannot

interpose a bar. One recent infraction of the prevalent general-ticket system occurred a few years ago in Michigan. If it be asked whether a recurrence to the district system will redeem presidential elections from the dangers by which they are environed under the general-ticket system, the answer is unsatisfactory. Despite the manifest improvement of a uniform district system upon the existing plan—the fairer opportunity it gives for the utterance of the electoral sentiment of the State, and the great obstacles it places in the way of successful frauds upon the suffrage by making the purchase of voters resident in different districts essential to their consummation—the fact remains that the district is an arbitrary unit in the choice of President, and that human ingenuity has yet devised no plan to circumvent partisan change and rearrangement of districts at the caprice of the party in power. An objection, not altogether untenable, made some years ago to the district system by Senator Edmunds, in a criticism upon the report of the Morton committee upon the constitutional amendment proposed by that committee in 1874, is that it would in effect make the choice of the executive purely national. Such a choice would become “the act of the people in their individual character as citizens of the United States, with substantially the same force as if no State lines existed. If the districts were formed without regard to State lines the plan would be essentially the same.” The full force of this assertion is impaired by the fact that each State would add its two electoral votes to the strength of the candidate who carried the majority of its districts. But no such objection can fairly be made to the system herein advocated, for under that system the voters, in every sense, remain voters in their respective States, and the choice is still determined within State lines.

The plans of Benton, Morton, and Maish, which may be treated as types, have been subjected to analysis, and

their defects have been exposed. The district system, commended by the fact that it was favored in the convention of 1787 and supported later by Jefferson and Madison, although greatly diminishing the incentive to corruption and bribery of voters, still fails of the ideal through its susceptibility to gerrymandering. It would have the great advantage of bringing the executive and the lower House of Congress into complete political accord, and the establishment of this *rapprochement* would be a decided political gain. An executive out of sympathy with the House and the Senate can accomplish little, whereas if affinity exists between him and the popular chamber, the Senate is not likely to prove an obstacle to needed legislation. On the other hand, the apportionment or proportional plan would give every voter his due weight as an electoral factor, and by eliminating the possibility of successful frauds would take away the temptation to their commission. The plan has been so modified as to insure the certainty of an election and the finality of the count. Nor does it seriously derange the harmony between the President and the House which the district method would assure and which is so eminently desirable for efficient legislative and administrative procedure.

No amendment will be complete which neglects to provide an effectual method for the settlement of all disputes arising upon the electoral count. No statesman who has ever given adequate thought to this subject has failed to express his conviction that the present mandate of the Constitution, "and the votes shall then be counted," is an enigma pregnant with evil possibilities. When the Morton electoral bill of 1873 was debated in the Senate,—and that debate was exhaustive,—even its staunchest champions admitted its imperfections; and the Act of 1887, which is generally similar in its tenor, but fuller of detail, could not escape like criticism. Its strongest

advocates conceded that it was far from realizing the ideal. It supplies no ultimate arbiter where the two Houses disagree, and undermines the independence of the executive department by placing the election eventually in Congress. Almost every writer who has treated of the electoral system, from the time of Kent onwards, has regarded the defective provisions touching the electoral count as the danger-spot in an otherwise almost perfect Constitution. There is not another clause of the organic law that has been so repeatedly discussed, or that has so obstinately refused to yield up its actual meaning to profound analysis. Senator Morgan, of Alabama, in October, 1881, uttered the abiding conviction of every thoughtful student of the Constitution, when he declared that, although for a century the people and Congress had been considering how they could best provide for "a free ballot and a fair count" of the votes of the electors for President and Vice-President, "not one hair's-breadth of actual progress has been made toward a solution of the real difficulties to be met."<sup>1</sup> The subject, he added, "has been discussed until it would overtax the most subtle mind to conceive of any phase of any question connected with the matter that has not been considered." And his conclusion well expresses the reasoning that induced a majority of the Senate in March, 1876, foreseeing the trouble that arose during the following winter, to agree to the Morton bill, and that subsequently impelled both Houses, with the startling experience of the disputed election fresh in memory, to agree to the imperfect solution that has become the law of 1887,—that "any adjustment of the difficulties which grow out of our imperfect constitutional provisions on this subject, if generally accepted as being fair, would be better than to leave it without any sort of regulation." "It should," Morgan admonished, "be enough to say to a wise people that all

<sup>1</sup> "Some Dangerous Questions," 133 *N. A. R.*, 324.

questions are open and dangerous that relate to the counting of the votes of electors. They are as numerous as it is possible for the ambition, the cupidity, the fraud, and the skill of wicked men to invent." Dawes, of Massachusetts, who, as a member of the Senate in the spring of 1876, voted reluctantly for the Morton Electoral Count bill, after announcing his conviction that the only effective remedy lay in a constitutional amendment, in a subsequent magazine article used these impressive words:<sup>1</sup>

"It is the height of folly to shut our eyes to this danger. And it is useless to seek in argument a satisfactory answer to these questions. The public mind will always divide upon them. The only safe solution of the problem is their removal by a constitutional amendment that shall make plain and simple every step in the process, both State and national, and shall also require or create a tribunal in each State competent to settle finally any possible controversy over the appointment of electors or their action till the record of what they do reaches some national official."

Every attempt to solve the problem should be predicated upon the teaching of history. Politics, as Burke very philosophically said, ought to be adjusted, not to human reasoning, but to human nature. Human nature in the United States has for more than a century been shaping our political institutions, and the trend of their development must be accepted as indisputable political facts in the framing of any amendment. At the very outset the separate independent life of the States must be recognized, and all notion of a vote by the united citizenship of the country regardless of State lines be dismissed. The inequalities of representation between large and small States are conceded, but must also be accepted. The spirit of compromise which swayed the proceedings of the convention of 1787 must animate twentieth-century

<sup>1</sup> "How Shall the President be Elected?" 140 *N. A. R.*, 97.

deliberations. Whether parliamentary government or presidential government, to use Walter Bagehot's famous contrast, be ideally the better, whether an executive elected and removable by Congress would secure more efficient political results,—unless the present sentiment of the American people is a reversion from the ideas of the framers of the Constitution, there must be adherence to their conception of the wisdom of the severance of executive, legislative, and judicial functions. The development of American institutions has been along this theory, and it is not possible in a short space of time to revolutionize the ideas of a whole people. Hence the amendment should maintain the separateness of the three great departments of government, and preclude the possibility of any invasion by Congress of the executive department, in the choice of the executive head of the nation. The electoral system has taught the peril of complicated machinery in politics; the change should therefore be in the direction of simplicity. As democracy early revolted against the tyranny of autocratic electors and has completely subjugated them to its purposes, the election should be direct for President and Vice-President. Every citizen should be privileged to cast his ballot directly for the candidate of his choice. The practical sense of the American people will never tolerate in any amendment the interposition of any further electoral medium between themselves and the manifestation of their will. Inasmuch as the Constitution intended that the States should have sole control over the appointment of electors, provided ineligible electors were not appointed, and that the election should be held on the appropriate day, and inasmuch as the whole tenor of our political history evinces the desire of the people of the States to act in their capacity of citizens of States in voting at presidential elections, State control should continue absolute. This the proposed amendment assures. The essential nature of our



complex government is to suffer no manner of change. The people qualified by the laws of the States to vote for presidential electors should vote for President direct, and their qualifications to exercise the elective franchise should not be subjected to authority of Congress, except in so far as such authority may have been committed to the national legislature by any of the recent amendments to the national Constitution. The count and the canvass of the vote must remain the exclusive duty of the State. The majority of the Electoral Commission of 1877 were in accord with the essential theory of the Government when they pronounced that, once the final State canvassing authority had spoken, its determination was beyond impeachment or even challenge by any department of the central Government. And the only duty that will devolve upon that Government should be the simple, impressive act of enumeration of plain returns, crowned by an act the most important of all for the peace and security of the nation, the declaration of the result,—a declaration which, once made, may never be controverted except by successful revolution.

Such an amendment I have aimed to draft. It makes but the slightest departure from the theory of the existing Constitution. It redeems the count from intricacy and rescues it from the domination of Congress. That it very much reduces the likelihood of double returns has heretofore been shown, and, as I have said, if a State should be guilty of the folly of transmitting more than one return, her disfranchisement, if that consequence had to follow, would be the result of her own act and not of the arbitrary action of Congress. Criticism of the constitutional system has usually been quadrennial. Public attention has not been vividly attracted to the defects which have been noted in earlier chapters. These should be rectified before another presidential election. Nothing but failure to appreciate the weakness of the

Constitution, an irrational veneration for its letter, or an undue spirit of conservatism, forbids a prompt and effective remedy.

In discussing the English constitution, Professor Dicey eulogizes the complete flexibility of an unwritten organic law like that of Great Britain. The constitutions of most of the States of the Union, open to amendment through the agency of a general convention or upon legislative initiative, with subsequent ratification by the people, approximate closely to the mobility that distinguishes an unwritten constitution. Much has been written of late regarding rigid constitutions, but there is no less viability in the Federal Constitution, although the faculty of revision has become almost lost by disuse. As early as 1823 Jefferson declared that the States had become so numerous that there was little likelihood of procuring amendment.<sup>1</sup> As the States increase in number, the tendency towards rigidity grows stronger, and the ability to amend decreases. Beyond the first ten amendments, which may almost be treated as part of the original text, only two amendments have been peacefully effected to the Constitution: the eleventh, which declared that no State should be subject to suit by a citizen of another State or of a foreign State, and the twelfth, the urgent need of which was demonstrated by the presidential election of 1801. The three succeeding amendments were only possible as the outcome of a civil war in which the integrity of the nation hung in the balance. The longer the task of amendment is postponed, the more difficult it will be found to accomplish it. Distrust of underlying

<sup>1</sup> Washington, in his correspondence, more than once admitted that the Constitution was not "free from imperfections," although there were "as few radical defects in it as could well be expected, considering the heterogeneous mass of which the convention was composed, and the diversity of interests that are to be attended to." It was his reliance upon the power to make future amendments which induced him to urge acceptance of the convention's work.

social forces may repel many from making any change, lest the temptation to untimely alteration prove overwhelming. But the fear of uncertain evil should not deter a wise and practical people from effecting redress for the positive ills of the electoral system; for the timidity involves the confession that the genius for constructive government, which was one of the noblest characteristics of our forefathers, has departed from the American people. Great as was the work of the convention of 1787, the wisdom with which its members were endowed was self-confessedly mundane. They used the provision for amendment effectively, and doubtless expected that it would be employed when needed by their successors. Prudence dictates that long-established governments should not be changed for light or transient causes, but when the evils of a system are plain and the dangers of its continuance demonstrable by actual experience, a remedy is demanded. Public sentiment, as Burke well observed, should be the sole source of alteration in law, and a wise conservatism waits until that sentiment speaks in imperative tones. But if any truth is revealed in our political history and proclaimed in the opinions of numerous statesmen and patriots, it is that the electoral system, adopted by the fathers with much misgiving and after profound differences of opinion, has never fulfilled the original design of its creators. If disaster shall ever overtake the republic, it will probably come from our neglect of the solemn and oft-repeated admonitions regarding the difficulties and dangers connected with the electoral count. When the voice of experience is so impressive in its warnings, to heed it becomes a sacred duty. Nor can reliance be placed upon judicial interpretation to render the process of amendment unnecessary. Although other provisions of the Constitution grow in stature and significance under construction by the courts, the clauses relating to the election

of President and Vice-President constitute exceptions to the rule, for they can rarely become the subject of judicial exegesis. There has been but one decision of the Supreme Court upon the presidential electoral system in one hundred years.

As to the method of initiating an amendment, a word may be added in conclusion. Proposed amendments have usually been presented in Congress as the outcome of resolutions in some State Legislature, or of the views of some individual member of the Senate or House. Ordinarily these proposals have occasioned little discussion. Upon a subject of such importance, the suggestion of President Harrison, in his message to Congress in 1891, might be made the basis of action. In advocating the establishment of the general-ticket system upon a constitutional foundation, he favored the appointment of a commission, non-partisan in its membership, "to be charged with the duty of inquiring into the whole subject of the law of elections as related to the choice of officers of the national Government, with a view to securing to every elector a free and unmolested exercise of the suffrage, and as near an approach to an equality of value in each ballot cast as is obtainable." An amendment originating in a commission of such a nature would probably elicit wide discussion. President Harrison suggested the appointment of a commission by the Supreme Court, but there seems no valid reason why the executive should not name it. The commission should then report to Congress. Many amendments to State constitutions, notably to the constitution of New York, have had their genesis in similar commissions.



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